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IN THE
Supreme Court of the United States
OCTOBER TERM, 1939

No. 9, ORIGINAL

STATE OF ARKANSAS,

Plaintiff,

versus

STATE OF TENNESSEE,

Defendant.

REPORT OF THE SPECIAL MASTER

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IN THE
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STATE OF ARKANSAS,
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vs.
STATE OF TENNESSEE,
Defendant } No. 9, Original

**SUBMISSION OF THE REPORT OF THE
SPECIAL MASTER.**

In the above numbered and entitled cause, this Honorable Court appointed me Special Master by its order dated May 17, 1937.

Promptly after my appointment I communicated with counsel for the States of Arkansas and Tennessee with a view to beginning the taking of testimony as soon as possible. I was advised that counsel desired to make an effort to reach a stipulation as to facts, and I deferred further proceedings in order to permit such opportunity. On February 10, 1938, I was advised that counsel had reached an agreement for the settlement of the boundary line between the two States at one of the two points involved in the litigation, being the point described in Count Two of the complaint. Counsel filed with me a

duly signed stipulation embodying this agreement, which stipulation accompanies this report.¹

Counsel having advised me that they were unable to reach any agreement as to the facts upon the matters involved in Count One of the complaint, the taking of testimony was begun on June 14, 1938, in a room in the Federal Building in Memphis, Tenn. On that day and the following day witnesses produced by Arkansas were examined and cross-examined, and documentary evidence for Arkansas was offered. After this evidence was transcribed, counsel agreed to resume the taking of testimony in Memphis on September 14, 1938. On that day and the following day witnesses for Tennessee were examined and cross-examined, and documentary evidence was introduced in behalf of Tennessee. On October 28, 1938, rebuttal testimony in behalf of Arkansas was taken in Dyersburg, Tennessee, in a courtroom of the State Court House at that point. On the following day the Master, accompanied by counsel, two of the expert witnesses and a stenographer, went upon the ground near Chic, Tennessee, and made an inspection of the present physical appearance of the territory at the points of the former channel of the Mississippi River and of the present channel.

After the testimony had been transcribed, the case was orally argued before me at my office in New Orleans on January 5, 1939. I afforded counsel all the time desired for oral argument. At that time counsel

¹While the point was not raised by counsel, I have considered whether this stipulation could be considered a compact requiring the consent of Congress. It appears, however, that similar stipulations in boundary suits have been given effect without such consent. See cases cited in Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustment*—34 Yale Law Journal 685, Note 41, and especially *Missouri v. Nebraska*, 197 U. S. 577 (1905); *Iowa v. Illinois*, 202 U. S. 59 (1906); compare *Virginia v. Tennessee*, 148 U. S. 503, 521, 522 (1893).

for both sides filed original briefs. Thereafter reply briefs were filed by each side.

On July 26, 1939, I visited the office of the Clerk and the library of this Honorable Court and there examined the original records and briefs in *Arkansas vs. Tennessee*, 246 U. S. 158, and *Arkansas vs. Mississippi*, 250 U. S. 39, which were particularly relied upon in the argument before me by counsel for Arkansas.

On August 9, 1939, I submitted to counsel a draft of my report and requested them to call my attention to any errors or omissions therein either in fact or in law, and offered to hear further argument if desired, although I stated that I thought the case had been fully and ably argued and that all points upon which counsel relied had been fully presented. I advised counsel that it was my understanding that formal exceptions need not be filed with me. Counsel for both parties advised me that they did not think any further argument necessary. They requested me to amplify and amend the statements in my report in two or three particulars, which I did. I understand that counsel will file in this Honorable Court exceptions to certain of my conclusions.

In pursuance of the order of this Honorable Court, I have reported the evidence and the exhibits received by me as Special Master by filing the same in the office of the Clerk of this Court with my certificate; and I herewith submit to the Court my findings of fact and conclusions of law and recommendations for a decree.

Respectfully submitted,

MONTE M. LEMANN,
Special Master.

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STATE OF ARKANSAS, Plaintiff,
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REPORT OF THE SPECIAL MASTER

STATEMENT OF THE PLEADINGS

On October 28th, 1935, by leave of court, the State of Arkansas filed its bill against the State of Tennessee, praying for a decree establishing the true boundary line between the two states at points described in the bill and confirming and establishing the jurisdiction and sovereignty of Arkansas over certain lands. On December 31, 1935, Tennessee filed an answer and cross bill praying that it be held entitled to jurisdiction over the lands in controversy.

The bill as filed contained two counts. Count One referred to a controversy arising from a change in the course of the Mississippi River resulting in the formation

of an island known as Needham's Island. Count Two referred to a controversy involving land forming part of Forked Deer Island.

An agreement was subsequently reached between Arkansas and Tennessee as to the matters involved in Count Two and the parties entered into a stipulation, which is filed with this report, providing that the disputed boundary line should be fixed as set out in the stipulation. Accordingly only the matters referred to in Count One were presented to the Master for consideration and only such matters are covered by this report.

The Complaint:

The allegations of Arkansas' complaint may be thus summarized:

Tennessee was admitted into the Union by Act of Congress of June 1st, 1796, and its boundary on the west was in conformity with the westerly boundary described by the Treaty of Peace concluded between the United States and Great Britain, September 3rd, 1783, 8 Stat. 80, whereby the territory subsequently comprising Tennessee passed to the United States, the western boundary of Tennessee, as fixed by said Act, being described as the middle of the Mississippi River.

Arkansas was admitted into the Union by Act of Congress dated June 15th, 1836, which fixed the eastern boundaries of the State as the middle of the main channel of the Mississippi River. Prior to the admission of Arkansas as a State, the territory now comprising the State was a Territory created by Act of Congress of March 2nd, 1819, out of a part of the Missouri Territory, which prior to the acquisition of the same by the United States on April 30th, 1803, (under the Treaty of the

same date between United States and France, known as the Louisiana Purchase), belonged to France, which had acquired the same by the Treaty of 1763 between England, France and Spain, whereby the boundary line between the British and French possessions, so far as this action is concerned, was established as a "line drawn along the middle of the Mississippi River."

On July 4th, 1819, when the Act of Congress of March 2, 1819 creating Arkansas Territory became effective, the Mississippi River flowed below Island 21 in a certain course set out in the bill of complaint and around a bend. Caving of the river bank reduced the narrow neck of land around which this bend extended to a width of approximately one-half mile so that in February 1821, the river suddenly broke through and across this peninsula, making a new channel across it, thereby cutting off an area from the territory of Arkansas which became an island known as Needham's Island; and the old bed of the river subsequently filled up. This constituted an avulsion by reason of which the boundary of the Territory of Arkansas became fixed by the channel as it existed immediately prior to the cut-off. The boundary line so established was the boundary line between Arkansas and Tennessee on June 10th, 1836,¹ when the Territory became a State and the area in suit then became, and at all times since has been, a part of Arkansas.

The Answer

The answer of Tennessee alleges the following:

The avulsion referred to in the bill of complaint occurred in 1821 or 1822, creating an island known at various times as Denham's Island, Needham's Island, Cutoff Island, and now known locally as Moss Island. Prior to 1828 the former channel of the Mississippi River which

¹This is an error for June 15, 1836; see 5 Stat. 50.

ran north, east and south of the territory in question had become virtually useless and unfit for navigation and from the year 1828 and onward up to the present time, the thread of navigation or main channel of the Mississippi River has always been west of the land in question. The effect of the language of the Act of Congress admitting Arkansas into the Union and fixing its boundaries was to confine the jurisdiction of Arkansas to the territory embraced within the boundaries as they existed at the dates the Act was passed and became effective (June 10th, 1836¹ and July 4, 1836) and inasmuch as on both of those dates the main channel of the Mississippi River then flowed west of the territory in question, Arkansas never acquired jurisdiction, dominion and control of the lands referred to because they lay without the boundaries of the state. Furthermore, immediately after the avulsion above mentioned, Tennessee began to exercise jurisdiction over the lands in controversy in various ways; entries and surveys thereof were made under the authority of Tennessee and grants therefor issued by Tennessee; the Supreme Court of Tennessee in 1872 in the case of *Moss v. Gibbs*, 57 Tennessee 283, held the land in question to be a part of Tennessee and the publication of this decision charged Arkansas with notice that Tennessee claimed title thereto; Tennessee for more than one hundred years has assessed the same for taxation and has collected taxes thereon; the inhabitants thereof have voted in Tennessee; process, both criminal and civil, from the courts of Tennessee have been executed upon said lands; the United States Postoffice on the lands was designated by the postal authorities as being in Tennessee; crimes against the Federal Government on the lands in question have been tried in the Federal Courts in Tennessee; Arkansas has never undertaken to assess the lands for taxation or to collect taxes from the same; the citizens

¹This should be June 15, 1836; see 5 Stat. 50.

and inhabitants of the land in controversy have never voted or performed other acts indicative of citizenship in Arkansas; the lands in controversy have never been surveyed by the Federal Government as a part of Arkansas, nor has any effort ever been made to dispose of the lands under the authority of Arkansas, at least not until so short a time prior to the filing of the complaint in this case as to be without evidentiary value.

JURISDICTION OF THIS COURT

Jurisdiction of this Court appears to be clear under Article III, Section 2, of the Constitution of the United States and Section 341, Title 28, USCA p. 171. See *Rhode Island v. Massachusetts*, 12 Pet. 657 (1838), and numerous boundary cases in this Court, including *Arkansas v. Tennessee*, 246 U. S. 158 (1917) and *Arkansas v. Mississippi*, 250 U. S. 39 (1919).

FACTS AGREED TO

As the pleadings show, the following facts are admitted and agreed to by the parties:

Prior to 1821, the land in controversy in this suit was on the west bank of the Mississippi River and the main channel of the river flowed to the east thereof. At the location involved in this suit, the river at that time flowed around a twelve mile bend caused by the extension of a peninsula into the river from the western shore. In 1821 an avulsion took place in the course of the river occasioned by the waters cutting across the neck of this peninsula at a point where it had become only half a mile wide due to caving of the river banks. At the present time the main channel of the Mississippi River flows to the west of the lands in controversy and has so flowed for many years prior to the present. The original channel of the river is now,

and has for many years been, filled up so that the island originally created by the avulsion is now, and has for many years been, physically connected to, and a part of, the eastern shore of the river.

FACTS IN CONTROVERSY

It is the contention of Arkansas that after the occurrence of the avulsion in 1821 the main channel of the river continued to flow to the east of the land here in controversy until after 1836, and that, therefore, the land in controversy was at the time of the admission of Arkansas into the Union, by the Act of Congress adopted June 15, 1836, within the boundaries of Arkansas as fixed by the Act (which made the middle of the main channel of the Mississippi River the eastern boundary of the State).

Tennessee, on the contrary, contends that long prior to 1836 the main channel of the river had come to be through the cutoff, and that at the time of the admission of Arkansas as a State in 1836, the land in controversy was on the east side of the main channel of the river and therefore never fell within the boundaries of the State as fixed by the admitting act.

The testimony taken before the Master related chiefly to this issue. The remaining testimony and documentary evidence introduced before the Master was offered by Tennessee to prove the exercise by it of dominion and jurisdiction over the disputed lands and the acquiescence of Arkansas in such exercise.

The original channel of the Mississippi River at the point involved in this case is shown on a sketch annexed to the bill of complaint as Exhibit A, which is a reproduction of a reconnaissance of the Mississippi

River at the point known as Needham's Cutoff, made by Young and Poussin, army engineers, in 1821. The present location of the lands in controversy and the physical condition with respect to the channel of the Mississippi River at the present time may be most quickly noted and followed by the Court by reference to a quadrangle map prepared by the War Department, Corps of Engineers, known as Arkansas-Tennessee Hale's Point Quadrangle. Copies of this map were offered in evidence by both parties and I have annexed a copy to this report. The area in controversy is shown on this map as "Moss Island". This map shows the present channel of the river. Prior to the cutoff, the river ran around the island, which is now in fact no longer an island because the old bed of the river has filled at the upper end and what was originally an island has now become a part of the shore on the east side of the river. Marked on the map immediately to the west of Moss Island is land described on the map as "Blue Grass T. H." (which is referred to in the record as "Blue Grass Towhead"), which has been formed since 1916 by the gradual processes of the river. Across the river from Blue Grass Towhead is the land marked "Wright's Point", which in the record is shown to be also referred to as "Musgrave Bar", which is a formation by accretion on the west bank of the river.

The area of Moss Island was estimated by a witness for Tennessee at 7,000 acres (Tennessee Testimony, page 279).

ISSUES SUBMITTED TO THE MASTER

The issues presented to the Master for decision may be thus summarized:

Issues of Fact:

- (1) Did the channel of the Mississippi River in 1836 flow to the east or to the west of the land here in controversy?
- (2) Did Tennessee prove its alleged exercise of dominion and jurisdiction over the lands in controversy and the acquiescence of Arkansas?

Questions of Law:

- (1) If the main channel of the Mississippi River at the point here involved was changed by an avulsion between 1819 (when the Territory of Arkansas was created) and 1836 (when Arkansas was admitted as a State) so that the lands in controversy had in 1836 been shifted to the east side of the main channel, did Arkansas as a State ever acquire jurisdiction of the lands in controversy?
- (2) If the main channel of the Mississippi River shifted between 1819 and 1836 so that the lands in controversy had in 1836 become situated on the east side thereof, did the lands then become part of Tennessee?
- (3) If the answer to question 1 is affirmative and that to question 2 is negative, or if the main channel of the river on the 15th day of June, 1836, continued to flow to the east of the lands in controversy, is Tennessee nevertheless entitled to prevail by virtue of the exercise of dominion and jurisdiction over the land in controversy and the acquiescence of Arkansas in such exercise?

An incidental question of law is presented as to the admissibility in evidence in this case of the depositions given in 1867 in the case of *Moss v. Gibbs*, 57 Tennessee

283 and the bill of exceptions therein, which were offered in evidence by Tennessee.

THE PROOF IN THE CASE

Arkansas' original proof consisted of the testimony of three witnesses, and eight documentary exhibits, directed chiefly to support of the contention that in 1836, when Arkansas was admitted to the Union, the main channel of the Mississippi River still flowed to the east of the land in controversy. Tennessee offered the testimony of four witnesses in contradiction of this contention. Tennessee also offered the testimony of seven witnesses in support of its claims of adverse possession. Tennessee's original documentary exhibits were fifty-three in number. In rebuttal Arkansas offered the testimony of three witnesses and six exhibits. After the conclusion of the rebuttal testimony, I went upon the ground, accompanied by counsel and the two leading witnesses for the plaintiff and defendant, respectively, and dictated on the ground a memorandum of my observations.

In my opinion, the testimony of the expert witnesses is inconclusive, but the decision upon issues of fact as to the location of the main channel of the river in 1836 is made quite clear by documentary evidence affording contemporaneous evidence of the situation. Except for the fact that this is a suit between States in which the Court may itself review all of the testimony, I should content myself with a reference to the documentary evidence. However, I have thought it best in view of the character of the case to present a summary of the oral testimony also, although without going into extended detail with respect thereto.

SUMMARY OF DIRECT EVIDENCE FOR ARKANSAS

The first witness for Arkansas, Colonel Lawrence Martin testified (Arkansas Testimony, pp. 2-46) that he was a geographer and Chief of the Division of Maps in the Library of Congress. His testimony was based entirely upon his analysis of maps and surveys and references to 1821 and 1824 editions of "Cramer's Navigator", a book published for the guidance of pilots and persons navigating the Mississippi River from Ohio to New Orleans in 1821 and 1824. The maps referred to consisted of the following:

A reconnaissance of the Mississippi River at the point known as Needham's Cutoff, made by Young & Poussin, army engineers, in 1821, and published in 1823. This reconnaissance shows the cutoff and recites that the river made it in February, 1821.

A plat of survey, certified by the General Land Office as made in 1837, covering Township 15, North Range 13 East, 5th P. M., Arkansas. This is the township in Arkansas immediately opposite the lands here in controversy.

A map of the alluvial region of the Mississippi River made by Captain A. A. Humphreys and Lieutenant H. A. Abbott for the War Department in 1861, with an enlargement thereof at the point of Needham's Cutoff.

A map of Arkansas made by D. F. Shall in 1846, with an enlargement thereof.

Colonel Martin testified that his analysis of the maps in question satisfied him that in 1837, the greater volume of the water in the Mississippi River was still flowing through the old channel and not through the cutoff. He made no pretense to qualify as a geologist or to have any expert personal knowledge of conditions upon the river.

In referring to the General Land Office survey of Township 15 North Range 13 East, covering lands in Arkansas opposite Moss Island, he relied for corroboration of his views upon the width of the channels of the river indicated upon the survey and expressed the opinion that the small island indicated on this plat opposite Section 12 in the township aforesaid was Moss Island.

He relied also upon his analysis of the Young and Poussin reconnaissance and said (Arkansas Testimony, p. 32) that he had attempted without success to find an explanation for the dotted line appearing therein¹. Colonel Martin read into the record an extract from the 1821 and 1824 editions of Cramer's "The Navigator". This work was also referred to by a witness for Tennessee and a summary of extracts therefrom appears later in this report.

The second witness for Arkansas was Mr. O. W. Gauss (Arkansas Testimony, pp 45 to 75) a surveyor and civil engineer, at one time a special agent for the General Land Office, and for the past twenty years engaged principally upon work for the St. Francis Levee Board and others upon matters pertaining largely to the Mississippi River. Mr. Gauss testified that a comparison of the General Land Office survey of Twp. 15, N. Range 13 E., made in 1837 (Arkansas Exhibit 2) with a survey of the river at the same point made about 1916 for the St. Francis Levee Board by a Mr. Dwight Morrison (Arkansas Exhibit 8) indicated to him that there had been a caving of the bank of the river opposite Needham's Cutoff since 1837 and that in his opinion this caving would not have taken place if the main channel of the river in 1837 had been through the cutoff. The

¹This line appears from the Table of Conventional Signs introduced by Tennessee to represent the channel of the river. See Tennessee Exhibit 1.

witness was of the opinion that there would have been a building up at this point and no subsequent caving there if the main volume of water had been coming through the cutoff in 1837. The witness referred to the General Land Office survey of Twp. 15 N. R. 13 E., (Arkansas Exhibit 2) and by use of the scale determined that the width of the cutoff between the east end of fractional section 12 and the cutoff island as indicated on the township plat was slightly over one-fourth of a mile and stated that in his opinion it was highly improbable that the river would have accommodated itself in this narrow channel or bed. Upon cross-examination, Mr. Gauss testified that insofar as the plat of survey of Township 15, N. R. 13 E. indicated the position of the Tennessee bank, it was only a sketch made by a surveyor on the Arkansas bank, saying

"The map shows the approximate position of the Tennessee bank, but I am satisfied that so far as that part is concerned it is a sketch and that the surveyor in making a sketch of the right bank was sketching and as there is an island, he could not look across there and tell. He would have to sketch it in."

Mr. Gauss testified substantially to the same effect on cross-examination when he was summoned to give testimony in rebuttal. See Arkansas Rebuttal Testimony, pp. 71 *et seq.*

The third and last witness for Arkansas was W. G. Huxtable chief engineer for the St. Francis Levee District, (Arkansas Testimony, pp. 78 to 81), who identified the plat made by Morrison upon which Mr. Gauss' testimony had been based, as having been made for the St. Francis Levee Board for the purpose of getting the description and area of the lands contained in Musgrave Bar (a formation which has taken place on the west

bank of the river opposite the lands in controversy). Mr. Huxtable testified that the Morrison plan had been approved by the Chief Engineer of the Levee Board as being "practically correct". (Arkansas Testimony, p. 79).

Arkansas also offered in evidence a certificate from the State Land Commissioner of Arkansas dated May 31, 1938 (unmarked but following Arkansas Testimony, p. 76) certifying that lands in fractional sections 11 and 12, Twp. 15 N. R. 13 E., in Mississippi County¹ had been selected from the United States as swamp and overflowed land by the State of Arkansas under the act of September 28, 1850 and acts subsequent thereto, commonly known as swamp land grants and had been granted by the State of Arkansas to named individuals. The certificate further recites that the records of the Arkansas Land Office covering lands selected from the United States as swamp and overflowed lands did not embrace any lands east of said sections 11 and 12.

SUMMARY OF DIRECT EVIDENCE FOR TENNESSEE

The evidence for Tennessee may be conveniently summarized under two headings:

(a) Testimony relating to the date at which the main channel of the river opposite the lands in controversy shifted.

(b) Testimony in support of the claim of adverse possession.

(a) As to the date of the shift of the channel in the river. On this point Tennessee relied chiefly upon the testimony of Dr. E. W. Glenn, occupant of the Chair

¹These lands are on the west bank of the river, opposite the lands here in controversy.

of Geology at Vanderbilt University, W. E. Elam, Engineer for the Mississippi Levee Board at Greenville, and S. E. Reynolds, Chief Engineer of the St. Francis Levee District of Missouri.

Dr. Glenn (Tennessee Testimony, pp. 67 to 182) identified extracts, certified by the Library of Congress, from editions of "The Navigator" by Zadok Cramer, appearing in the years 1821 and 1824 and editions of "The Western Pilot" by Samuel Cumings which appeared in the years 1825, 1829, 1832, 1834 and 1838 (Tennessee Exhibits 18 to 23, inclusive, also 34). It appears from his testimony that Zadok Cramer went to Pittsburg in 1800 and shortly thereafter began the publication of a book to guide persons going down the Ohio and Mississippi Rivers. He was succeeded immediately by Samuel Cumings. Recitals in these works with reference to the Needham Cutoff as they appear from the certified extracts offered in evidence are as follows:

"*The Navigator*," 11th Edition (1821) and 12th Edition (1824):

"Islands Nos. 22, 23 & 24.

Surround a left hand point above bayou river —channel on the right side of all of them. Needham's or New Cut-off, commences at No. 22 and strikes near to No. 25; cutting off a distance of about 12 miles, and not more than half a mile through. Needham was the first who was drawn into it. The passage was dangerous and some boats lost; but it is expected that the power of the water will sweep away the obstructions, and leave a free course at this time."

"*The Western Pilot*", Editions of 1825, 1829, 1832 and 1834:

"No. 21,

Channel to the right. Four and a half miles

below the head of No. 21 is Needham's cut-off. The old bed of the river above the cut-off is entirely dry at low water: channel through the cut-off, pretty well to the left, (to avoid the bar formed at the point on the right) and when nearly through pull hard to the right, to avoid the eddy on the left below. Two miles below the cut-off is a large bar in the middle, opposite the left hand point—keep well towards the right shore."

"*The Western Pilot*", Edition of 1838:

"No. 21, or Pilgrim Island,

"Lies about the middle of the bend, or the head of it is about half way from the foot of No. 18 to Needham's cut off, and lies near the middle of the river. Channel to the right of it in the bend.

"Needham's Cut-off

"The upper mouth of the old bed of the river, is in a manner grown up. The island made by the cut-off is on your left, at the lower mouth of the old bed of the river. A high bar opposite the mouth of Obien, drives you down the left shore past Hale's point, to the main point on the left, a mile and three quarters below, then over to the bend on the right below the foot of the cut-off bar, then down the right shore to the point on the right, at Blueford's wood yard; now wear off to the left shore under the big bar on the left. Now you are in Canadian Reach."

Dr. Glenn also referred to an authenticated copy (Tennessee Exhibit 24) of the Reconnaissance of the Mississippi River made by Captains Young and Poussin of the United States Engineers in 1821. This is the same plat to which Colonel Martin had referred in his testimony and a copy of which was introduced as Arkansas Exhibit 1. The authenticated copy introduced by Tenn-

essee has attached to it a "Table of Conventional Signs" explaining the marks on the plat with which Colonel Martin had testified he was not familiar (Arkansas Testimony, p. 32). According to the explanation in this table the dotted line, consisting of an extended dash followed by two short dashes, indicates the line of the channel. This dotted line on the reconnaissance of Young and Poussin indicates that the channel in 1821 was through the cutoff.

Dr. Glenn further testified (Tennessee Testimony, pp. 82 *et seq.*) that he had examined the plat of Land Office Survey of Twp. 15 N. R. 13 E. (Arkansas Exhibit 2) with particular reference to the island appearing thereon, opposite Section 12 in Twp. 15 N. R. 13 E., which Colonel Martin and Mr. Gauss had testified in their opinion represented Moss Island, and that his calculations upon the scale shown in the plat showed that its acreage was approximately 108.8 acres. He had also calculated the area of Moss Island as shown on the Hale's Point Quadrangle map made by the United States Engineers office in 1935,¹ and had found the area of the Island as shown thereon to be 3,724.8 acres, from which he concluded that it was impossible that the object designated as an island on the plat marked Arkansas Exhibit 2 could have been Moss Island.²

Dr. Glenn referred to accounts of, and comments upon, cutoffs in the Mississippi River appearing in the

¹This map (a copy of which is attached to this report) was referred to first by Mr. Gauss (Arkansas Testimony, p. 51), was subsequently referred to also by Dr. Glenn (Tennessee Testimony, p. 86) and Mr. Reynolds (Tennessee Testimony, p. 252) and several copies thereof are in the record marked respectively Arkansas Exhibit 7, Tennessee Exhibit 25 and Tennessee Exhibit 38.

²One of the witnesses for Tennessee estimated the area of the island at 7,000 acres. See testimony of Franklin Latta, Tennessee Testimony, page 279. In the correspondence in 1848 between the Surveyor of Public Lands in Arkansas and the General Land Office, it is stated that the island "is estimated to contain 15,000 acres of good land and others which are subject to inundation, all of which is valuable either for agricultural purposes or for wood". See Tennessee Exhibits 52 and 53.

1861 General Report of Captain Humphreys and Lt. Abbott of the United States Engineers (Tennessee Exhibit 26), in articles appearing in the Engineering News Record in 1936 (Tennessee Exhibits 27 and 28) and in various reports of army engineers (Tennessee Testimony, pages 97 *et seq.*) as showing that ordinarily where a cutoff is caused by the force of the river, the increased slope of the water surface will cause the new bed to rapidly become the main channel of the river. Ordinarily, he said, one would expect the original bed of the river to remain open for navigation only a very few years.

In August, 1938, (a month before the giving of his testimony) Dr. Glenn went upon the ground and caused to be cut three trees, an ash, a hackberry and a sycamore, which according to his testimony were growing on what he fixed as the old bed of the river. Photographs of the cross sections of these trees were offered in evidence as Tennessee Exhibits 29 to 33. The witness testified that he counted the rings on the stump of one of the trees; that the count indicated that the tree was 102 years old (Tennessee Testimony, page 114); and that trees of this character would not grow in a place covered with water. Counsel for Arkansas took issue particularly with the witness' location of these trees upon the old channel of the river, and there was an elaborate cross examination as to the exact location of the point or points at which these trees were found, which the witness undertook to indicate by marks on various plans and exhibits. (Tennessee Testimony, pp. 109 *et seq.*)

Counsel for Arkansas also subjected the witness to cross-examination with respect to testimony given by him in another case in 1918, a copy of the witness' deposition in which was offered in evidence. The witness admitted that he had changed his views to some extent

since testifying in the earlier case (Tennessee Testimony, pp. 137 *et seq.*) because, he said, "I have learned a good many things since then."

The testimony of Dr. Glenn as to the age of the trees to which he referred was confirmed by the testimony of W. E. Duggan, District Forester of Tennessee (Tennessee Testimony, pp. 181 to 187), who testified that the rings on the trees showed that the ash, sycamore, and hackberry trees were respectively 104, 106 and 102 years old, and that these three species would not grow in an area covered by water.

W. E. Elam testified (Tennessee Testimony, pp. 187 to 239) that he was a civil engineer who since 1906 had been with the Mississippi Levee Board at Greenville, Mississippi, most of the time as Assistant Chief Engineer; that he was President of the Mid-South Section of the American Society of Civil Engineers and author of two articles on cutoffs in the river and had devoted special attention to the study of cutoffs. In his opinion, immediately after a cutoff occurred, the velocity of the water going around the bend would be lessened and filling would begin in the original channel; in about two or three high waters the bar across the original channel at the upper end would be high enough for willows to begin to grow on it. He considered the caving which took place on the west bank of the river immediately above Wright's Point and the subsequent formation of Wright's Point to be natural consequences of the cutoff. The witness visited the terrain on August 26th shortly before he gave his testimony, and saw the stumps of the trees as to which Dr. Glenn and Forester Duggan had testified. In his opinion they were located as indicated by Dr. Glenn on the plan marked Tennessee Exhibit 35, and on what was a part of the original river bed, which he had determined from his observation of the elevation

of the ground, which satisfied him that the trees had been cut from the former bed of the river and not from an island.

S. E. Reynolds testified that he had been Chief Engineer for thirty-eight years of the St. Francis Levee District of Missouri, the southern end of which was about five miles above the Needham Cutoff; that he had with Mr. Elam gone upon the ground shortly before he testified and had inspected the stumps of the trees which had been cut, and in his opinion they were definitely in the old river bed. The witness expressed the view that after the cutoff, the upper end of the old channel of the river would fill up in from one to two years, or possibly three years, and that in 1836 the navigable channel was through the cutoff. He was also of the opinion that the formation of Blue Grass Towhead and Musgrave Bar or Wright's point was a natural consequence of the action of the river after forcing its way through the cutoff and after the gradual erosion of lands in Sections 11 and 12 in Twp. 15 N. R. 13 E. on the west bank.

(b) Testimony in support of the Claim of Adverse Possession.

In support of its claim of adverse possession, Tennessee offered the following evidence:

S. C. Michell testified (Tennessee Testimony, pages 2 to 10) that he was 78 years old and in 1870 was a boy living with his uncle on Moss Island, right next to the store in the town of Chic; he went to school at this point in a school operated by Tennessee; he began to vote about 1882 and the election was held under the authority of Tennessee in his uncle's store at Chic; he was acquainted with the Justice of the Peace who served a warrant upon him for failure to do road work somewhere between 1881

and 1885 and this individual, "Uncle Mac Taylor", was Justice of the Peace for Dyer County, Tennessee.¹ The witness also testified that he was living in that vicinity just after the postoffice was established at Chic. Tennessee offered a certificate (Tennessee Exhibit 1) from the Acting Postmaster General, that the postoffice at Chic, Dyer County, Tennessee, was established on September 18th, 1900, discontinued on November 15, 1913, and re-established on June 18th, 1915, and is still in operation. The witness stated that when arrests were made on Moss Island, they were made by officers of Dyer County, Tennessee, and he never heard of any officers from Arkansas ever coming to make any arrests or serve any process; and the land in controversy was on the Tennessee side of the river when he first knew it.

E. M. Huffman testified (Tennessee Testimony, pages 10 to 18) that he was 84 years old and when he was a boy visited his grandfather, Isaac Brackin at a place called Bluegrass,² close to the Obion River. He was for 40 years Justice of the Peace in Hickman Township in Mississippi County,³ Arkansas in which Wright's Point and Musgrave Bar⁴ are situated and he never heard of Arkansas exercising jurisdiction, either criminal or civil, over the area he knew as Bluegrass; he always heard this area spoken of as being in Tennessee and had never heard it called Arkansas; he voted in the elections in

¹Tennessee offered as its Exhibit 46 a certified copy of proceedings of the County Court of Dyer County, Tennessee, held on September 4, 1882, qualifying M. M. Taylor as Justice of the Peace for Dyer County, Tenn.

²As shown by the quadrangle map attached to this report, Blue Grass Towhead is a formation immediately on the west of the cutoff island or Moss Island, and the island itself is referred to at times as Bluegrass.

³Counsel stipulated that if the Court finds that the boundary line is where Arkansas contends, the lands affected will fall within Mississippi County, Arkansas, and if the Court finds the boundary line to be as alleged by Tennessee, the lands affected will fall within Dyer County, Tennessee. See Arkansas Testimony, p. 6.

⁴Wright's Point and Musgrave Bar are on the west bank of the river, opposite the land in controversy.

Hickman Township and served as election officer; no one from Bluegrass had ever attempted to vote in Hickman Township.

G. L. Scott testified (Tennessee Testimony, pp. 18-24) that he was 65 years of age and since 1896 or 1897 had been acquainted with Moss Island, on which he had cut timber; he lived with his brother on that island in 1897 and married in Bluegrass in 1902; he was married by a Magistrate who lived in Bluegrass and was a Justice of the Peace serving under Tennessee; his brother was Deputy Sheriff on Bluegrass or Moss Island; he paid taxes at Chic as Tennessee taxes; elections on the island were held on Chic and the persons for whom votes were cast were all officials of Tennessee.

C. C. Johnson (Tennessee Testimony, pp. 24-26 and 52-59) testified that he was 48 years old and had lived all of his life on Moss Island; elections on the Island were always held by Tennessee; the roads were worked by authority of Tennessee; people were married by a Tennessee Justice of the Peace with marriage licenses issued in Tennessee; Tennessee operated the school on the Island; the post office was located at Chic; when crimes were committed, arrests were made by the Sheriff of Dyer County and other deputies of Tennessee; no Arkansas officers had ever been known to arrest criminals or serve process on the Island; Tennessee collected poll taxes from the people on the Island and Arkansas had never attempted to do so; land taxes were assessed by Tennessee and paid at Dyersburg, Tennessee; Arkansas never attempted to assess anyone for taxes on the Island; the residents of the Island had never been known to undertake to vote in Arkansas.

L. O. Brayton (Tennessee Testimony, pp. 26-52 and 60-64) a Civil Engineer residing at Dyersburg, Tennessee, identified Tennessee Exhibit 14 as a plan or map

made by him showing the location of various Tennessee entries of land on Moss Island. This plan¹ was prepared by him from entries in the records in the court house at Dyersburg, Tennessee, certified copies of which were introduced in evidence as Tennessee Exhibits 2 to 13, and which may be thus summarized:

Tennessee Exhibit 2 is a survey dated March 5, 1824, made by virtue of entry No. 734, dated March 8th, 1823, for John Terrell and John C. McLemore, as agent, covering 1,466 acres "in an island in the Mississippi River known by the name of Cutoff Island." The calls of the survey indicate that the bank of the main channel was then in the western chute. The survey recites that it was intended to cover 2,560 acres but no more could be obtained because of the interference of an old grant made by North Carolina to M. Armstrong.

Tennessee Exhibit 3 is a survey dated December 8, 1843, made by virtue of entry No. 31, dated March 6th, 1836, for James Manny, covering 1,428 1/2 acres.

Tennessee Exhibit 4 is a survey dated November 15, 1838, made by virtue of entry No. 406, for William B. Jones, Assignee of Robert I. Chester, covering 456 acres.

Tennessee Exhibit 5 is a survey dated December 20, 1828, for William B. Jones, Assignee of the heirs of Thomas and Robert King, covering 600 acres.

Tennessee Exhibit 6 is a survey dated November 11 and 12, 1866, made by virtue of entry No. 126, dated August 10, 1859, for Chas. C. Moss, covering 3,000 acres.

Tennessee Exhibit 7 is a patent by the State of Tennessee dated December 5, 1839, to James Singleton and others, assignees of Terrill and Mc-

¹The accuracy of this plan was criticized by Mr. Gauss, witness for Arkansas, in his rebuttal testimony at pages 44 to 49. However, apparently it is not in controversy that the entries, surveys and patents permitted, directed or granted by Tennessee, and referred to in this plan, actually covered lands on Moss Island.

Lemore, based upon entry 734, dated March 8, 1823, in the name of John Terrill, John C. Mc-Lemore Agent, etc., covering 1,467 acres "situated, lying and being in the county of Dyer in Ranges 10 and 11, Section 2 of an island in the Mississippi known as Cutoff Island."

Tennessee Exhibit 8 is a patent by the State of Tennessee dated April 27, 1848, to Z. B. Phillips and James H. Doyle, based upon an entry dated March 18, 1848, covering 376 acres.

Tennessee Exhibit 9 is a patent by the State of Tennessee dated April 1, 1856, to Isaac Sampson covering 1,000 acres.

Tennessee Exhibit 10 is a patent by Tennessee dated October 15, 1848, to G. A. Connally and T. D. Connally and Brother by virtue of Entry 43, dated December 22, 1838, covering 200 acres lying in the County of Dyer, Ranges 10 and 11, Section 2, on the bank of the Mississippi River.

Tennessee Exhibit 11 is a patent by Tennessee dated June 7, 1867, to Chas. C. Moss containing 3,000 acres "situated on the cutoff island lying south and west of the south and west banks of the old channel of the Mississippi River and south and west of the Obion River which now runs in said old channel of the Mississippi River."

Tennessee Exhibit 12 is a patent by Tennessee dated September 28, 1840 to John Williams, assignee of heirs of Thos. and Rob. King by virtue of entry No. 37 in the name of William B. Jones, for 600 acres, survey being dated December 20, 1888.

Tennessee Exhibit 13 is a patent by Tennessee dated September 29, 1840, to John Williams, assignee originally of Thomas Shute, based on Entry 38 in the name of William B. Jones, covering 456 acres.

Mr. Brayton also testified that he had been unable find any evidence that any portion of the land in

controversy had ever been surveyed by the Federal Government or sectionalized.

Franklin Latta, an attorney practicing at Dyersburg, Tennessee, testified (Tennessee Testimony, pp. 259-281) in connection with Tennessee Exhibits 42 to 45. Exhibit 42 showed a tax sale in 1848 by the Sheriff and Tax Collector of Dyer County, Tennessee covering lands forming part of the McLemore and Terrell entry No. 734 "on the cutoff island", sold for unpaid taxes for the year 1845.

Tennessee Exhibit 43 showed a similar tax sale on July 22, 1874 by the Tax Collector for Dyer County, Tennessee, for the unpaid taxes of 1874 covering a portion of the McLemore and Terrell 1,467 acres "on the cut-off island in Dyer County, Tennessee."

Tennessee Exhibit 44 is a certified tabulation of assessments by the County Clerk of Dyer County, Tennessee, showing assessments in Dyer County, Tennessee, for the years 1870 to 1935 of various lands on Moss Island. The certificate recites that tax books prior to 1870 cannot be found.

Tennessee Exhibit 45 is a certified statement of payments of taxes on the above assessments.

Mr. Latta also testified that no records of assessments or tax payments existed in Dyer County prior to 1870, the courthouse having been burned during the civil war. After inquiry he had been unable to find any evidence that the lands in controversy were ever surveyed under the authority of the United States; he estimated the acreage of the land in controversy as 7,000 acres, including the original island in the old river bed; a large part of the land on the island is in cultivation in cotton and corn and has been cleared during all of his lifetime.

Byron Morse (Tennessee Testimony, pp. 64-67) testified that he is an abstractor of titles, familiar with the

records of Mississippi County, Arkansas, and keeps on file as part of his records photostatic copies of the United States Government surveys which he gets from the General Land Office; Section 12 in Twp. 15 N. R. 13 E. was the most easterly point in the State of Arkansas surveyed and sectionalized by the United States Government; any lands in Arkansas to the east of Section 12, Twp. 15 N. R. 13 E. would have to be in another township, which would be known as Twp. 15 N. R. 14 E., and there is no such township; there are no records in Mississippi County, Arkansas, showing any assessments for taxes or deeds or conveyances of any lands east of Section 12, Twp. 15 N. R. 13 E. In connection with this testimony there was offered in evidence the certificate of the County Clerk of Mississippi County, Arkansas, showing the assessment for taxation of lands in Mississippi County, Arkansas, in Sections 11 and 12, Twp. 15 N. R. 13 E., for the years 1869, 1874, 1879, 1881 and 1908.

Subject to the objection of Arkansas, Tennessee offered in evidence a copy of the opinion of the Supreme Court of Tennessee in the case of *Moss v. Gibbs*, rendered in 1872. This is reported in 57 Tenn. 283 and is the case referred to in the answer of Tennessee in the present suit. It was an action of ejectment involving the title to a portion of the lands involved in the present suit. Plaintiff therein claimed title under a grant from Tennessee dated 1867. The defendant claimed title under a grant from North Carolina dated 1788. The Court rejected the defendant's claim on the ground that the lands were on the west bank of the Mississippi River in 1788 and belonged to Spain and were outside the boundaries of North Carolina. The defendant, however, contended that the plaintiff must fail because he had acquired no valid title from Tennessee, inasmuch as the lands were in Arkansas, and Tennessee could therefore

make no valid grant thereof. The court held that in 1836 the main channel of the river was through the cutoff and that the lands in controversy were, therefore, on the east side of the main channel of the Mississippi River in 1836 when Arkansas was admitted into the Union, and accordingly never fell within the boundaries of the State of Arkansas. In the course of its opinion, the Court said:

"It is in proof, that as early as 1826, the State of Tennessee, through her various officers, judicial and ministerial, claimed and exercised jurisdiction over the island, but as against the United States in which the title was vested, this claim and exercise of jurisdiction did not and could not vest the title in the State, but this continued exercise of jurisdiction may be legitimately looked to in determining the question whether there is still in the United States a present, valid *bona fide* subsisting title."

The Court then held that Tennessee had acquired jurisdiction over the lands by virtue of Acts of Congress adopted in 1841 and 1846. Counsel for Tennessee in the present suit have conceded in their briefs filed herein that these Acts did not have the effect assigned to them in the opinion of the Supreme Court of Tennessee, but they rely upon the statement in the opinion and the depositions taken in the case as evidence that the main channel of the river was, prior to 1836, through the cutoff. Counsel for Tennessee also rely upon the statement in the opinion in support of Tennessee's claim of adverse possession.

Tennessee also offered in evidence (Tennessee Exhibits 47-A and 48) depositions taken in 1867 in this suit of *Moss v. Gibbs*, entitled in the lower court, *Moss v. Thompson*. These depositions were given by Isaac Bra-

kin, Joseph Michell and Isaac Sampson. In 1867 Brakin was 67, Michell was 72, and Sampson was 68.

The original depositions and the original bill of exceptions were produced before me by Mr. Latta, the witness above referred to, who testified (Tennessee Testimony, pp. 269 *et seq.*) that he had borrowed them from the Clerk of the Chancery Court of Dyer County, Tennessee, in whose custody they now are, in order that he might produce them before me. I examined the originals and dictated into the record at Tennessee Testimony, page 276, a note that they bore the mark of having been written a considerable number of years ago and that there was nothing in their appearance that would belie the dates which they bore. These papers were offered by Tennessee as ancient documents and were received in evidence, subject to the objection of Arkansas. I have concluded that they were admissible in evidence as hereinafter set out in my discussion of questions of law.

Michell¹ testified that he had passed up and down the Mississippi River ever since 1814 and was familiar with Cutoff Island, which was formed in 1822; the island was formed suddenly in less than three days, and the witness was there while the channel was changing from east to west; he visited the island again in 1819 and in 1822 in trading with the Indians; the river was navigable until 1824 east of the land in dispute.

Brakin² testified that he had known the land since 1823; previous to 1823 it lay on the west side of the river; the channel had not changed from east to west up to

¹ Michell was apparently a relative of S. C. Michell, who testified before me that when he was a boy in 1870 he lived with his uncle on Moss Island.

² Brakin was apparently the grandfather of W. M. Huffman, whose testimony is summarized above and who testified that when he was a boy he visited his grandfather, Isaac Brakin, at Blue Grass.

1823; in the spring of 1823 he saw a steamer trying to go through the east side and other boats also tried to go through the cutoff and failed, but the land in question was completely surrounded by water at all times up to the years 1828 or 1829.

Sampson testified that the island was formed between 1818 and 1826 and was reported to have been formed in 1822; boats had ceased to pass around the east side of the island in 1826 or perhaps sooner; he was along the new channel formed west of the island in 1830 and 1831 and the timber on each side of the new chute was then very large, and many of the trees near the edge of the bank appeared from their size to be more than a century old.

Tennessee also offered as its Exhibit 49 the bill of exceptions in the case of *Moss v. Thompson, Gibbs and others*. This refers to the depositions of Sampson, Michell and Brakin and also refers to the testimony of various other individuals, including one W. H. Clark, who testified that he was Sheriff of Dyer County, Tennessee from 1831 to 1840 and that the land in controversy was on an island over which said county had exclusive jurisdiction all the time he was Sheriff; that he had served process there and collected taxes on the land and during that time it was reported to belong to the County of Dyer; that maps of the county were made in 1836 and 1843 on all of which Cutoff Island was shown as a part of the Martin Armstrong grant and the McLemore and Terrell grant(s) were laid down on the island. The bill of exception includes the statement by Isaac Sampson that he had lived in Dyer County ever since 1826 and during that time "Dyer County has exercised jurisdiction over the said island and the lands have been taxed, the people have their deeds registered in the county".

The bill of exceptions also recites testimony of various witnesses showing possession of lands on the island by persons claiming under the Martin Armstrong grant and the McLemore and Terrell grant.

Tennessee also offered as its Exhibit 51 a copy of the opinion of the Supreme Court of Tennessee in *Laxon v. State*, reported in 126 Tenn. 302, decided in 1912. This was an appeal from a conviction for murder committed on Island 21 based upon the contention that the island was not within the State of Tennessee. The Supreme Court of Tennessee quoted from its opinion in *Moss v. Gibbs* and held it applicable to Island 21, which it found from the evidence in the case to be the same as Cutoff Island. The language contains the following language:

"It is said, however, that the lands of Dyer County as originally laid off in 1823 do not embrace this particular island. It is true, nevertheless, ever since that time Dyer County has exercised jurisdiction over this island and persons living there have paid taxes to Dyer County and voted in that County and this has never been questioned by the State and no other county has any claim to it."

It appears from Tennessee Exhibit 52 that on January 19th, 1848, William Pelham, Surveyor of Public Lands in Arkansas, addressed a letter to the Commissioner of the General Land Office in Washington, reading as follows:

"Surveyor's Office, Little Rock.
"January 19, 1848

"Sir:

"I have been called upon to have an Island in the Mississippi River surveyed and the lands brought into market. The Island is estimated to contain fifteen thousand acres of good land and

others which are subject to inundation, all of which is valuable either for agricultural purposes or for wood.

"The Island was formed in the year 1822 by the River forcing itself through a peninsula, which is now called Needham's cutoff and is considered to be the channel of the stream. My information is that the State of Tennessee does not claim it, and that it is deemed by the citizens of the vicinity to be a portion of the public domain. If the surveys were extended to it, it would fall in T. 15 N. R. 14 E.

"An expression of opinion on this subject is requested."

Under date of March 2nd, 1848, the Commissioner of the General Land Office replied as follows (Tennessee Exhibit 53):

"General Land Office
"March 2nd, 1848

"Sir:

"Your letter of the 19 January last has been received, in which the opinion of this office is requested as to the survey of an Island containing about fifteen thousand acres of land, which was formed by the Mississippi River forcing a passage through a peninsula, the stream at that point being known as Needham's cutoff. In answer I have to state, that if satisfactory evidence can be obtained that the original main channel of the Mississippi River was on the East side of this Island, and that this Island was formed as suggested by you in 1822, by the River forcing its way through a peninsula, I see no objection to your ordering the survey of it, more especially if it is not claimed by the State of Tennessee, as suggested by you."

The record, however, indicates that no survey was ever made by the United States of the land referred to

in this correspondence and the inference would seem clear that the matter was dropped because it was found that the statement in the letter from Mr. Peiham dated January 19th, 1848 that the State of Tennessee did not claim the land was found to be erroneous.

Tennessee also offered in evidence as Exhibits 36 and 37, plats of the United States Government surveys made of lands in Twp. 14 N. R. 13 E. and Twp. 16 N. R. 13 E., covering lands in Arkansas and approved by the Surveyor General's office in that state.

REBUTTAL TESTIMONY FOR ARKANSAS

Arkansas offered the testimony of three witnesses in rebuttal.

One of these witnesses, William Riggs (Arkansas Rebuttal Testimony, pp. 2-4) testified that he showed other Arkansas witnesses the stumps of the trees that had been cut under the direction of Dr. Glenn.

A. R. Shearon (Arkansas Rebuttal Testimony, pp. 6-23) testified that he was a lumber man experienced in the woods and in handling timber for twenty years, and his experience had carried him over the Mississippi River bottom land. He had gone out upon the ground and examined the stumps of the trees and confirmed their age. He testified that hardwoods such as ash, sycamore and hackberry grew only after cottonwoods and cottonwoods only after willows; that cottonwood came ten to fifteen years after willows and lasted approximately thirty years, depending on their location and thickness; and that the lands on which the trees here in question grew must have been in existence fifty years or longer before those trees were propagated. The testimony was offered to show that the trees could not have been cut

from points situated in the channel of the river as existed in 1821.

Ellis Trammell (Arkansas Rebuttal Testimony, pp. 23-24) testified that he was a lumber man for twenty years and experienced in handling lumber and watching its growth upon the Mississippi River. His testimony was substantially to the same effect as that of Mr. Shearon.

Mr. O. W. Gauss, recalled by Arkansas (Arkansas Rebuttal Testimony, pp. 5-6, 35-88) confirmed the testimony of Messrs. Shearon and Trammel as to the number of years which would have to elapse before ash, sycamore or hackberry trees could begin to grow upon land previously covered by water. He testified that he considered it a physical impossibility for the trees cut under Dr. Glenn's supervision to have been located on the former bed of the river, as the presence of the hardwood timber indicated that there must have been land at that point before 1821. Much of the examination and cross examination of Mr. Gauss upon his testimony in rebuttal was devoted to his location of the points at which the trees were cut with reference to the former course of the river. It was the witness' view that the trees were cut from former island in the river. The witness further testified in rebuttal of the views expressed by the expert witnesses of Tennessee as to the conduct of the river after the cutoff with reference to the formation of Moundgrave Bar. He also testified in refutation of the suggestion of Dr. Glenn that the formation shown on the township map (Arkansas Exhibit 2) was a sandbar, being the view of the witness that this formation was intended to represent Moss Island as seen by the surveyor from the opposite bank, although there was no triangulation at this point and hence no survey, and although

surveyor standing on the western shore of the river could only have made a guess at the extent, size and location of the island and could hardly have seen the Tennessee shore on the opposite side. Mr. Gauss testified that in his opinion the Brayton plan (Tennessee Exhibit 14) did not accurately show the location of certain Tennessee entries and surveys on Moss Island. He did not, however, question the existence of these surveys and entries, although he said that it was often difficult to locate the lines from the calls in the surveys. Mr. Gauss further testified with respect to the formation of Musgrave Bar and read into the record affidavits made in another litigation with respect to the history of this formation, which he considered to support his view that the main channel of the river in 1836 was still around the original bend and not through the cut-off. In connection with the testimony of Mr. Gauss, Arkansas introduced six documentary exhibits, consisting of plans, affidavits and a map of the river at another point (marked Arkansas Rebuttal 1 to Arkansas Rebuttal 6, inclusive).

Arkansas offered in evidence a survey of the Commissioner of State Lands of the State of Arkansas dated June 13th, 1938, reciting that application was filed on October 10th, 1935 by P. K. Kissell to purchase Bluegrass Towhead but that appointment of a surveyor to survey the land was held in abeyance because the Commissioner's office was advised and informed that there was a controversy between the States of Arkansas and Tennessee as to whether these lands were located within the boundaries of Arkansas or Tennessee, and to date no further action had been taken on this application.

INSPECTION OF THE GROUND BY THE MASTER

After Arkansas had concluded its rebuttal testimony, I went upon the ground in the company of counsel for Arkansas and Tennessee, Mr. Gauss and Dr. Glenn and the court reporter. As we proceeded along the ground,

I dictated notes of my observations and interrogated Mr. Gauss and Dr. Glenn. The reporter's transcript of my dictation will be found in the record following the rebuttal testimony for Arkansas. It appeared that Mr. Gauss had misunderstood from the markings on the Brattton plan (Tennessee Exhibit 14) the location of the points at which Dr. Glenn had undertaken to indicate the location of the three trees that had been cut. However, the witnesses remained in disagreement as to whether the points at which these trees were growing were points which in 1821 were occupied by the main channel of the river, as contended by Dr. Glenn, or whether these points were at that time situated on an island or outside the then channel, as contended by Mr. Gauss. In my opinion it would be impossible for one in my position, without expert technical knowledge, to determine solely from an inspection of the ground today whether the points in question were, over one hundred years ago, in the then main channel of the river or upon an island or outside the main channel. The former river bed and channel of the river is grown over with underbrush. Some difference in the elevation of the ground is apparent as one walks along, but it is not sufficiently marked to enable the untrained observer to reach a conclusion as between the conflicting views of the experts who testified in this case.

CONCLUSIONS UPON ISSUES OF FACT

I might experience difficulty in reaching a conclusion as to where the main channel of the river was when Arkansas was admitted to the Union in 1836 if the record contained nothing but the conflicting testimony of the experts.

Colonel Martin's testimony is based entirely upon his analysis of maps. The Young and Poussin reconnaissance to which he referred would seem on its face to indicate that its authors considered the main channel of

the river to be already through the cutoff in 1821. I do not think any weight can be given to the plat of survey of Twp. 15 N. R. 13 E., upon which Colonel Martin and Mr. Gauss seem to rely as indicating the location of the cutoff island in 1837. The survey contains no evidence of triangulation opposite the island. Mr. Gauss himself testified that one standing on the western shore of the river in Section 12, Twp. 15 N. R. 13 E. could only have made a guess at the extent, size and location of the island and could hardly have seen the Tennessee shore on the opposite side. The field notes of the original survey introduced by Tennessee as Exhibit 39 make no reference to any island at this point. The 1861 map of Captain Humphreys and Lieutenant Abbott and the Shall 1846 map of Arkansas afford no convincing or first hand evidence of the conditions on the river in 1836.

The testimony as to the trees cut under the direction of Dr. Glenn does not establish the channel of the river in 1836. The rebuttal testimony of Arkansas is in my opinion sufficient to show that these trees (which are conceded to have been over one hundred years old) could not have been growing upon the point included in the 1836 channel of the river, because trees of this variety must have followed willow and cottonwood and could not have begun to grow until a period of as much as fifty years had elapsed after the area had ceased to be covered by such a stream as the main channel of the Mississippi River would have been. These trees must, therefore, have grown at a point outside the 1836 channel of the river.

There is left of the testimony of the experts their conflicting views as to the inferences to be drawn (in determining the date at which the main channel flowed through the cut-off) from the erosion of the Arkansas

bank opposite the cutoff and the formation at a lower point on that bank of Musgrave Bar or Wright's Point. Arkansas had only one qualified witness on this subject as against three for Tennessee. Apart from the counting of heads, I should have trouble in determining which of the conflicting theories, standing alone, was the more plausible. But other evidence establishes the fact that the main channel of the river would in the course of two or three years (if not sooner) always be through a cutoff. It is the force of the river which causes a cutoff in the first instance. In the present case, water which had previously gone around a bend for twelve miles came across the cutoff at a point which eliminated the former circuitous route and caused the river to fall at the point of the cutoff to an extent to which it had previously fallen only over a distance of twelve miles. Witnesses for Arkansas agreed that the river's fall is between four-tenths and five-tenths of a foot to the mile.¹ Thus the initial fall at the point of the cutoff would have been six feet and the velocity of the river through the cutoff must have been great. While every case differs somewhat from other cases, the evidence as to what has happened in other cutoffs on the river as shown by contemporaneous records also supports the conclusion that the main channel of the river flowed through the cutoff within not more than three years after the cutoff occurred.²

¹See Colonel Martin's testimony at Arkansas Testimony, page 27; Mr. Gauss' testimony at Arkansas Testimony, page 60.

²Judge Lurton's opinion in *Stockley v. Cissna*, 119 Fed. 821, shows that the Centennial Cutoff shortened the distance around the bend some fifteen miles and that within sixty hours a new channel, some twenty to forty feet deep in ordinary water, was permanently established. In *State v. Pulp Company*, 119 Tenn. 47 at p. 61, which deals with the same cutoff, it is said that the river made a new channel in about thirty hours. "The fall in the river around the elbow from six to eight feet was all condensed in one mile of the cutoff and made a strong current there. This, of course, drew the water from the old channel rapidly and greatly reduced its depth. The old bed immediately began to fill with sand and sediment and alluvial deposit and bars formed in it. It became dry land, cottonwood and willow trees began to grow upon it, and it is now for the most part covered with valuable timber and susceptible of cultivation."

Apart from the foregoing, the documentary evidence produced supplies a contemporary record that prior to 1836 the main channel of the river flowed to the west of the land in controversy. Most convincing are the recitals in "The Navigator" and "The Western Pilot", works published for the guidance of pilots and persons navigating the Mississippi River at the time.¹ The number of editions through which these works went leaves little room to doubt their reliability. Both parties in the present controversy offered extracts from them in evidence, although the extracts offered by Tennessee included later editions which were not offered by Arkansas. In the 1821 and 1824 editions of "The Navigator" it is said that the passage of the water through the cutoff when it first took place was dangerous "but it is expected that the power of the water will sweep away the obstructions and leave a free course at this time." In the edition of 1825 it is stated that the channel is through the cutoff. Similar recitals are made in the editions of 1829, 1832 and 1834. In the edition of 1838 it is stated that "the upper mouth at the old bed of the river is in a manner grown up. The island made by the cutoff is on your left at the lower mouth of the old bed of the river."

In my judgment, the evidence afforded by these contemporaneous river guide books is determinative of the issue as to where the main channel of the river was in 1836, when Arkansas was admitted to the Union. It is corroborated by the depositions given in 1867 by the witnesses in the case of *Moss v. Gibbs*, which afford direct personal testimony of eye witnesses that boats had ceased to pass around the east side of the cutoff island in 1826, or perhaps sooner. It is also corroborated by the recital in the Terrell and McLemore grant of 1823,

¹In *Moore v. McGuire*, 205 U. S. 214 (1906), this Court referred to these books as affording evidence as to the channel of the river.

(Tennessee Exhibit 2) that the main channel was at that time in the western chute of the river. The reconnaissance of Young and Poussin would indicate that the main channel was through the cutoff as early as the end of 1821. Taking the case as a whole, I am satisfied that when Arkansas was admitted to the Union in 1836, the lands in controversy were on the east side of the main channel of the river.

The record in my judgment also clearly shows that Tennessee has exercised dominion and jurisdiction over the lands on the cutoff island since before 1826. The contemporary evidence shows that as early as 1823 entries of the land were being made under the authority of Tennessee and surveys were made under authority of Tennessee as early as 1824. Witnesses sixty-five, seventy-eight and eighty-four years old testified before me that the inhabitants of the island always voted in Tennessee elections; were taxed by Tennessee, married by Tennessee Justices of the Peace, required to do road work under Tennessee authority, educated upon the island in a school operated by Tennessee. The records of Dyer County, Tennessee, showed that assessments on the lands in controversy for local taxes were made by Tennessee authorities and land taxes paid to Tennessee as far back as 1870, prior to which records are missing. Tennessee Exhibit 42 shows a tax sale by a Tennessee sheriff in 1848 covering lands on the island. The bill of exceptions in the case of *Moss v. Gibbs* shows testimony in that case that as far back as 1826 Tennessee assessed the lands on the cutoff island, collected the taxes on them and served process there. The opinion of the Supreme Court of Tennessee in *Moss v. Gibbs*, 57 Tenn. 283, recites these facts as proven therein. But, if I am mistaken in thinking that it is proper for the court to consider the depositions and opinion in *Moss v. Gibbs* as affording evidence in this case, the testimony taken

before me and the other documentary evidence, consisting of certified copies of entries, surveys and patents, is, in my judgment, sufficient to prove Tennessee's long and uninterrupted exercise of dominion and jurisdiction over the lands in controversy.

I am also of the opinion that the record shows the acquiescence of Arkansas in Tennessee's assertion of dominion. There is no showing that Arkansas ever asserted any claim to the land in controversy prior to the institution of this suit. The lands were never surveyed or granted by Arkansas. In 1848 the United States Surveyor of Public Lands in Arkansas wrote to the General Land Office in Washington that he had been called upon to survey the lands on the cutoff island. He received a reply authorizing him to proceed with the survey of the island "more especially if it is not claimed by the State of Tennessee". But no survey was ever made. On October 10th, 1935, application was filed with the Commissioner of State Lands of Arkansas for the purchase of Bluegrass Towhead, but no action was taken thereon. The opinion of the Supreme Court of Tennessee in *Moss v. Gibbs*, 57 Tenn. 283, was published in the year 1872 and made the claims of Tennessee a matter of public notoriety.¹

CONCLUSIONS UPON QUESTIONS OF LAW

(1) An incidental question of law, to which I have previously referred, is presented as to the admissibility in evidence of the opinions in *Moss v. Gibbs* and *Laxon v. State*, and the depositions and bill of exceptions in the former case. It is, of course, clear that the decisions of the Supreme Court of Tennessee are not binding upon

¹In *Moore v. McGuire*, 205 U. S. 214, at 220, evidence apparently less cumulative than that in this record was held sufficient to show that Arkansas had exercised dominion over the island there in controversy with the acquiescence of Mississippi.

Arkansas. See *Arkansas v. Tennessee*, 246 U. S. 158 at 176, where it is said:

"It is hardly necessary to say that *State v. Muncie Pulp Co.*, *supra*, and *Stockley v. Cissna*, 119 Fed. Rep. 812, relied upon in defendant's answer as judicial determinations of the boundary line, can have no such effect against the State of Arkansas, which was a stranger to the record in both cases."

Tennessee does not, however, claim in this case that the decisions of the Supreme Court of Tennessee may be considered as judicial determination of the boundary lines. It contends as to these opinions only that they constitute public record of Tennessee's assertion of dominion and jurisdiction over the lands. It also contends that the depositions and bill of exceptions in *Moss v. Gibbs* are properly to be received in evidence and considered by the court as ancient documents.

Among the documents so received in boundary suits have been included deeds maps, and plans; these are but the unsworn declaration of their signers and authors. Recitals in guide books such as "The Navigator" and "The Western Pilot" and statements in historical works of reference have similarly been admitted in evidence and considered by the Court.

In *McGuire v. Blount*, 199 U. S. 142 (1905) the court referred with approval to 3 Wigmore on Evidence, Sections 2138 and 2139, containing the statement that in the case of ancient documents, it was only necessary to show that they were of the age of thirty years and came from a natural and reasonable custody; from a place where they might reasonably be expected to return.

In *Patterson v. Gaines*, 6 Howard 550 (1848) at 599, the Court said:

"The general rule certainly is, that a person cannot be affected, much less concluded by any evidence, decree, or judgment, to which he was not actually, or in consideration of law, privy. But the general rule has been departed from so far as that wherever reputation would be admissible evidence, there a verdict between strangers, in a former action, is evidence also; such as in cases of manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigrees."

In *Morris v. Harmer*, 7 Peters 554 (1833) an action of ejectment involving a lot in Cincinnati, the plaintiffs were permitted to read in evidence from a history of Cincinnati, the date of the survey and laying out of lots in a part of Cincinnati. The Court held this was not error, and also held it not error to admit a plat made by the original proprietor of the City.

In *The Schools v. Risley*, 10 Wall. 91 (1869), an ejectment suit to cover certain lands in Missouri, the Court held that it was not error to admit in evidence a plat made in 1764 and placed in the office of the Recorder of Land Titles in 1825.

In *Ayres v. Watson*, 137 U. S. 584 (1891) an action of trespass to try title to lands in Texas, the Court held it was not error to admit in evidence field notes and a map made apparently in 1833, saying at page 596:

"Courts have always been liberal in receiving evidence with regard to boundaries which would not be strictly competent in the establishment of other facts. Old surveys, perambulation of boundaries, even reputation, are constantly received on the question of boundaries of large tracts of land.

In that case, the Court referred, with apparent approval, to the opinion of Mr. Justice Field, when Chief Justice of California in *Morton v. Folger*, 15 Cal. 275, 279, 282, (1860) in which the Court held admissible the deposition of a deceased surveyor in a case between other parties.

See also *Moore v. McGuire*, 205 U. S. 214, referred to *supra*; *Barr v. Gratz Heirs*, 4 Wheat. 213 (1819) (deed in chain of title in ejectment suit); *Winn v. Patterson*, 9 Peters 663 (1835) (deed in chain of title in ejectment suit); *Fulkerson v. Holmes*, 117 U. S. 389 (1885) (deed in question of pedigree in ejectment suit).

In *Bogardus vs. Trinity Church*, 4 Sanford's Ch. Rep. 633 (1847) it is said:

"In their search for truth, the courts are required, in instances like the one under consideration, to receive evidence which would be inadmissible if offered respecting events occurring within the memory of living witnesses. Thus the statements of historians of established merit, the recitals in public records, in statutes and legislative journals, the proceedings in courts of justice, and their averments and results, and the depositions of witnesses in suits or in legal controversies, are from necessity, received as evidence of facts to which they relate, but always with great caution, and with due allowance for its imperfections and its capability of misleading; and restricted, as to historical evidence, to facts of a public and general nature."

While there appears to exist no decision of this court directly holding that depositions of witnesses are admissible as ancient documents, I agree with the contention of Tennessee, that no reason in substance exists for distinguishing between such depositions and the unsworn declarations of surveyors and parties to deeds, where boundaries

are involved and the conditions otherwise applicable to the reception in evidence of ancient documents are fulfilled, as they are in this case. Compare *Freeman v. Phillips*, 4 M. & S. 486, 105 Eng. Rep. 914 (1816); Wigmore on Evidence, Sections 2138-9.

(2) The history of Tennessee is set out in the statement of facts in *Arkansas v. Tennessee*, 246 U. S. 158 (1918) at 160 as follows:

"By the Treaty of Peace concluded between the United States and Great Britain, September 3, 1873, 8 Stat. 80, the territory comprising Tennessee passed to the United States, its westerly boundary being described (Art. II) as 'a line to be drawn along the middle of the said Mississippi'. It formed a part of the State of North Carolina. In the year 1790 North Carolina ceded it to the United States (Act of April 2, 1790, c. 6, 1 Stat. 106). In a report made in the following year by Thomas Jefferson, then Secretary of State, and submitted to Congress by President Washington, the bounds of the ceded territory were described, the western boundary being 'the middle of the River Mississippi,' 1 American State Papers, Public Lands, p. 17. And by Act of June 1, 1796, c. 47, 1 Stat. 491, the whole of the territory thus ceded was made a State."

(3) The Territory of Arkansas was organized by Act of March 2nd, 1819, 3 Stat. 493. It was carved out of the Territory of Missouri, which in turn was a part of the Louisiana Purchase. *Missouri v. Iowa*, 7 How. 660 (1848) and statutes there cited. The eastern boundary of the Territory of Arkansas was, therefore, like that of Missouri, the eastern boundary of the Louisiana Purchase, which under the treaty between the United States and France, dated April 30th, 1803 (8 Stat. 200) was "the middle of the Mississippi River". This was

likewise the western boundary fixed in the treaty between the United States and Great Britain signed September 3, 1783, 8 Stat. 80. See *Missouri v. Kentucky*, 11 Wall. 395, 401 (1870).

(4) The lands here in controversy were at the time of the organization of the Territory of Arkansas attached to the western bank of the River and were undoubtedly a part of the Territory of Arkansas in 1819.

(5) The avulsion which took place in 1821 did not change the boundary of the Territory of Arkansas and the land in controversy was, therefore, after the avulsion in 1821 still a part of the Territory of Arkansas. See *Nebraska v. Iowa*, 143 U. S. 359 (1892) at 361, where the Court said:

"It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, sec. 159, it is said: 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates.' "

In the case cited, at page 370, the Court said:

"It appears, however, from the testimony, that in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but that of avulsion.

By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the centre line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel."

See also *Missouri v. Nebraska*, 196 U. S. 23 (1904), where the Court said at page 37:

"We perceive no reason to believe that Congress intended, either by the acts of 1820 or 1836 relating to Missouri or the act admitting Nebraska into the Union, to alter the recognized rules of law which fix the rights of parties where a river changes its course by gradual insensible accretions, or the rules that obtain in cases where, by what is called avulsion, the course of a river is materially and permanently changed. Missouri does not dispute the fact that when Nebraska was admitted into the Union the body of land described in the present record as Island Precinct was in Nebraska. It is equally clear that those lands did not cease to be within the limits of Nebraska by reason of the avulsion of July 5, 1867."

The well established principle has been applied in a controversy between the two States which are parties to the present suit. *Arkansas v. Tennessee*, 246 U. S. 159 (1917). See also *Arkansas v. Mississippi*, 250 U. S. 39, 45 (1919); *Louisiana v. Mississippi*, 282 U. S. 458, 465 (1930).

⁶ (5) Arkansas was admitted into the Union by Act dated June 15th, 1836 (5 Stat. 50), which fixed the boundaries of the State as follows:

"Beginning in the middle of the main channel of the Mississippi River, on the parallel of

thirty-six degrees north latitude, running from thence west, with the said parallel of latitude, to the St. Francis River, thence up the middle of the main channel of said river to the parallel of thirty-six degrees thirty minutes north; from thence west to the southwest corner of the State of Missouri; and from thence to be bounded on the west, to the north bank of Red River, by the lines described in the first article of the treaty between the United States and the Cherokee nation of Indians west of the Mississippi, made and concluded at the city of Washington, on the 26th day of May, in the year of our Lord one thousand, eight hundred and twenty-eight; and to be bounded on the south side of Red River by the Mexican boundary line, to the northwest corner of the State of Louisiana; thence east, with the Louisiana State line, to the middle of the main channel of the Mississippi river; thence up the middle of the main channel of the said river, to the thirty-sixth degree of north latitude, the point of beginning."

The language of this Act as to the eastern boundary of the State is substantially the same as the language of the treaties of 1763, 1783 and 1803, namely, the "middle of the river".¹

At the time this statute was enacted, the lands in controversy were on the east side of the main channel of the Mississippi River and, therefore, if the boundary of Arkansas is to be fixed in 1836, the lands involved here are not within the limits of the State of Arkansas, although they had been within the limits of the Territory of Arkansas. Tennessee contends that such is the correct holding, pointing out that the Territory of Arkansas was not coterminous with the State of Arkansas since the former included territory now embraced in the State of

¹This Court has held that the term "middle of the river" as used in the treaties indicated the middle of the channel. *Iowa v. Illinois*, 147 U. S. 1, (1893); *Arkansas v. Tennessee*, 246 U. S. 158 (1917).

Oklahoma, and relying upon *Moore v. McGuire*, 205 U. S. 214 (1906). In that case the plaintiff filed a bill to remove a cloud upon the title of lands alleged to be in Arkansas. The Circuit Court found that the land was in Mississippi and dismissed the case for want of jurisdiction. This Court reversed this decision, saying at page 219,

"The land in controversy is Island No. 76, formerly called Chapeau Island, in the Mississippi River, and whether it is part of Arkansas or of Mississippi depends, as both parties, agree, on what was the western boundary of Mississippi, as established by the Act of Congress admitting that State to the Union. Act of March 1, 1817 c. 23, 3 Stat. 348. In that Act the State is bounded by a line 'beginning on the river Mississippi' and running around the State 'to the Mississippi river, thence up the same to the beginning.' The plaintiffs contend that these words should be construed to bound the State on the eastern bank of the river, while the defendants maintain that they refer to the middle of the main channel, as it then was. The chief difference is upon the question of fact whether the main channel was to the east or west of the island in 1817, but as the construction of the statute also is in dispute, there is jurisdiction, and *Joy v. St. Louis*, 201 U. S. 332, cited by the appellees, does not apply.

"We shall assume for the purpose of decision that the boundary is the middle of the main channel as it was in 1817, and address ourselves at once to the chief issue. * * * * "

The Court then reviewed the evidence and concluded that in 1817, when Mississippi was admitted into the Union, the main channel of the river was on the east or left descending bank and the island in question, therefore, did not fall within Mississippi.

Tennessee relies particularly upon the language which the Court employed in saying:

"Arkansas was admitted to the Union by Act of Congress of June 15, 1836, c. 100 5 Stat. 50. This Act purported, in terms, to bound the new state by the middle of the main channel; that is, of course, as it then was, so that if at that time the channel was on the Mississippi side, the act of the Government imported an understanding that the boundary of Mississippi went no further."

But the opinion as a whole makes it clear that the Court rested its decision upon its finding that the channel was on the Mississippi side not only in 1836, but also in 1817. The Court concluded its discussion with the following comments:

"In the Navigator, Zadok Cramer, published for a number of years at Pittsburgh for the information of pilots, in 1806 the channel is said to be good on both sides. In 1808 and 1811 it is said that the left (east) side is the best in low water. In 1814, 1817 and 1818 on the other hand, the best channel is said to be on the right side at all stages. We refer to all the years that we have seen. In view of this statement for the very year when Mississippi was admitted, it is impossible not to hesitate, but in Cumming's Western Pilot for 1833 we read 'channel either side; the right is nearest, and the left is probably rather deepest', and this seems to us to have been true for the whole time. Upon the whole evidence we are compelled to decide that the plaintiffs have made out their case."

Having in mind the rule that general language in opinions must be read with reference to the facts particularly under consideration, the reference in this opinion to the boundaries of Arkansas in 1836, does not seem

ne sufficient support for the argument of Tennessee
t the language of the Act of June 15th, 1836 admitting
ansas into the Union must be taken to indicate an
ntion of Congress that lands which at that time were
art of the Territory of Arkansas should be excluded
n the boundaries of the State as admitted into the
on because the lands had, between 1819 and 1836,
n physically severed from the Territory by an avulsion.

I think it more reasonable to hold that Congress
not intend that the State of Arkansas should have a
erent eastern boundary from that which the Terri-
y had had, and that Congress did not intend that the
ands here in controversy, which, immediately prior to the
s of 1836 were within the boundaries of the Territory
Arkansas, were by the admission of Arkansas into
Union to be excluded from Arkansas.

If the Act admitting Arkansas into the Union
uld properly be considered as fixing the eastern
ndary of the State of Arkansas at a point different
m the eastern boundary of the pre-existing Territory
Arkansas, and as excluding the lands in contro-
sy from the State of Arkansas because prior to the
sage of the Act of June 15, 1836, the main channel
the river had by an avulsion, which took place after
organization of the Territory, been shifted to
west of the lands, it would apparently be nec-
ary to hold that the lands became a part of the
ate of Tennessee at that moment, since the lands must
either in Arkansas or in Tennessee. I have been re-
red to no authority which would support the conclu-
on that the land in controversy could be within neither
ate. Compare *Coffee v. Groover*, 123 U. S. 1, 22
(87) where the Court said: "Where territories are

co-terminous, they must have a common boundary". As the lands were certainly not originally a part of Tennessee when the latter was admitted into the Union in 1796, at which time its western boundary was fixed at the middle of the river (*Arkansas v. Tennessee*, 246 U. S. 158, 160), they could have become a part of Tennessee only by virtue of a subsequent grant or cession thereof to Tennessee by the United States. Tennessee's argument is, in effect, a contention that the act admitting Arkansas into the Union and fixing the boundaries of the State of Arkansas at the middle of the main channel of the river constituted an inferential grant by the United States to Tennessee of the lands here involved. In *Moore v. McGuire*, 205 U. S. 214, the Court said that the language of the Act admitting Arkansas into the Union and bounding the new state by the middle of the main channel, imported an understanding that the boundary of Mississippi went no further than the then channel of the river. This does not amount to saying that the Act admitting Arkansas would evidence an intent that the boundary of Mississippi (whose position in the cited case corresponds to that of Tennessee in this case) should be extended beyond its previous limit so as to incorporate in the State situated on the east bank of the river land not previously belonging to it. In the case cited the Court's decision was not controlled by any finding as to the location of the river's channel in 1836 or any finding that the channel had changed between 1817 and 1836. On the contrary, after reviewing conflicting evidence, the Court expressly held that in 1817 when Mississippi was admitted, the channel was on the Mississippi side, as it was also in 1836.

While the point is not free from argument, I think it less reasonable to impute to Congress in 1836 an intention to extend the then boundaries of Tennessee than to conclude that it was the intention of Congress

that the lands in controversy, which then formed a part of the Territory of Arkansas, should remain within the limits of the State then created. Undoubtedly, in fact, Congress in 1836 did not even know that an avulsion had taken place on the river at the point involved in this case in 1821, much less the date when the avulsion had changed the main channel of the river. In this very case Arkansas is even now contending that the avulsion did not alter the main channel of the river until after 1836. It is true that the Young and Poussin map is shown by the record (Arkansas Testimony, page 6) to have been sent to Congress by President Monroe as part of a message which was published in 1823 as a part of House Document 35, 17th Congress, Second Session, and that the marks on that map show the opinion of the authors that the main channel of the river in 1821 already flowed through the cutoff.¹ Tennessee argues that this gave Congress constructive notice of the avulsion and of the change which had taken place in the main channel of the river prior to 1836. But if it were reasonable to impute notice of these facts to Congress, it would seem equally reasonable to impute to Congress a knowledge that under the correct rule of law this avulsion, and the change which it had wrought in the main channel of the river, had not operated to remove from the Territory of Arkansas the lands which prior to the avulsion had been attached thereto; and if Congress had been fully advised in 1836 both as to the facts regarding the avulsion and as to the legal consequences thereof, I see no reason to suppose that Congress, if informed that the boundaries of the Territory of Arkansas had not been changed by the avulsion, would nevertheless have intended to fix the eastern boundary of the State of Arkansas at

¹In the opinion in *Moore v. McGuire*, 205 U. S. 214, reference is made to the short time (three months) in which this reconnaissance was prepared.

a different point from that to which the eastern boundary of the Territory of Arkansas would have extended.

In *Moss v. Gibbs*, 57 Tenn. 283, *supra*, the Supreme Court of Tennessee rested its decision upon the Acts of Congress of February 18th, 1841, 5 Stat. 412, c. 7 and August 7th, 1846, 9 Stat. 66 c. 92, by which the United States granted certain lands to the State of Tennessee. Upon the argument before me counsel for Tennessee conceded that this ground for the decision could not be maintained because the statutes in question applied only to lands in the State of Tennessee and were not intended to operate, and did not operate, to enlarge the boundaries of Tennessee as they existed at the time these acts were passed.

It is true that my conclusion up to this point would leave in Arkansas lands which now for upwards of one hundred years have been on the east side of the river. That however, is the result which regularly follows from avulsions upon the Mississippi River and I do not find the existence of that result a sufficient reason to adopt what would otherwise in my opinion be an unreasonable construction of the act admitting Arkansas into the Union. Compare *Indiana v. Kentucky*, 136 U. S. 479 (1889) where the Court said at page 508:

"If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artifi-

cial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri v. Kentucky*, 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river."

The result of the decisions in *Arkansas v. Tennessee*, 246 U. S. 158 (1917) and *Arkansas v. Mississippi*, 250 U. S. 39, (1919) is also to place within Arkansas lands which by avulsions were severed from the western shore of the river and have become attached to the eastern shore, although ordinarily jurisdiction of Arkansas does not extend to lands on the east bank of the river. These decisions also show that the application of the rule of Thalweg (which, it is said, rests upon equitable considerations and is intended to safeguard to each state equality of access to, and right of navigation in, boundary streams) must yield to the rule that an avulsion does not change a pre-existing boundary.¹ These circumstances preclude me from attaching controlling weight to the argument of Tennessee that the boundaries should be fixed in this case so as to give each state immediate access to the river.

(8) I am of the opinion, however, that Tennessee is entitled to prevail in this case because of its continuous assertion for many years of dominion and jurisdiction over the lands in controversy, with the acquiescence of Arkansas.

¹See also to the same effect *Louisiana v. Mississippi*, 282 U. S. 458 (1930). Compare *Louisiana v. Mississippi*, 202 U. S. 1, (1905).

The decisions of this Court recognize the application of the doctrine of prescription in controversies between states.

Rhode Island v. Massachusetts, 15 Peters 233 (1841) was a case in which Rhode Island averred that a mistake had been made in drawing the true boundary line between Massachusetts and Rhode Island; that Massachusetts had held possession by virtue of this mistake which had not been discovered by Rhode Island until 1740 when she took steps to correct it; that she had never acquiesced in the possession of Massachusetts after the mistake had been discovered, but had ever since constantly resisted it. Massachusetts filed a demurrer and contended that it appeared upon the fact of the papers that Rhode Island was barred by prescription or must be presumed to have acquiesced in the boundary agreed upon and if she did not acquiesce, she had been guilty of such laches and negligence in prosecuting her claim that she was no longer entitled to the countenance of a Court of Chancery. The Court overruled the demurrer on the ground that upon the allegations of the bill Rhode Island might show circumstances which would take the case out of the application of the rules of prescription, acquiescence and laches. The language of the Court however, indicated that in the absence of such showing these rules would be held applicable. See page 274.

"So, too, in relation to the facts stated in the bill to account for the delay. It will be in the power of the complainant to show, if she can, that her long-continued ignorance of an error (which, if it be one, was palpable and open,) was occasioned by the wild and unsettled state of the country, and that the subsequent delay was produced by circumstances sufficiently cogent to justify it upon principles of justice and equity, or was assented to by Massachusetts, or occasioned by her

conduct. And, on the other hand, it will be the right of the defendant to show, if she can, that Rhode Island would not have been ignorant of the true position of this line until 1740; or, if she remained in ignorance until that time, that it must have arisen from such negligence and inattention to her rights, as would render it inexcusable; and should be treated, therefore, as if it had been acquiescence with knowledge: or she may show that, after the mistake is admitted to have been discovered, Rhode Island was guilty of laches, in not prosecuting her rights in the proper forum, and that the excuses offered for the delay are altogether unfounded or insufficient; and that Massachusetts never assented to it nor occasioned it."

Upon the trial of the case on the merits the Court held that the boundary having been settled by a joint commission in 1711, it was too late to disturb the line of compromise upon an allegation of mistake not clearly made out. See *Rhode Island v. Massachusetts*, 4 How. 591 (1845). The Court said at page 639:

"No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary."

Missouri v. Kentucky, 11 Wall. 395 (1870) presented a controversy as to an island in the Mississippi River. The claims of Kentucky were derived from Virginia and the latter's boundary was fixed by the Treaty of

1763 between France, Spain and England. Missouri was admitted to the Union in 1820. The Court held that if the island was east of the middle of the main channel of the river either in 1763 or in 1820 or at any intermediate period between those dates, the jurisdiction of Kentucky rightfully attached to it and any subsequent change in the course of the river would not alter the boundary. Reference was made to the fact that Missouri had made no attempt to subject the people living on the island to her laws or to require of them any duties of the citizens belonging to the State and had never made any effort to occupy the island or exercise any jurisdiction over it, while Kentucky was at the time of the commencement of the suit and had been for many years in the actual and exclusive possession of the island, exercising the rights of sovereignty over it. It was, however, not necessary for the Court to rest its decision upon these circumstances alone, because it reviewed the evidence and found the weight thereof to show that in 1820 the main channel of the river flowed to the west of the island and that Missouri, therefore, had no claim thereto.

Indiana v. Kentucky, 136 U. S. 479 (1889), involved a claim by Indiana to land on what at the time of the suit was on the north side of the Ohio river. The Court found that the conflicting evidence upon the whole supported the claims of Kentucky, but rested its decision upon the long acquiescence of Indiana in Kentucky's exercise of dominion and jurisdiction. See page 510 where the Court said:

"This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potent than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any

steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."

This decision and excerpts from this language were quoted with approval in *Virginia v. Tennessee*, 148 U. S. 503, 523 (1893).

In *Moore v. McGuire*, 205 U. S. 214, 220 (1906), the Court, in finding certain lands to be in Arkansas referred to the fact that Arkansas had exercised dominion over the island in controversy from 1847 to recent times while the State of Mississippi had only recently attempted to tax it.

In *Louisiana v. Mississippi*, 202 U. S. 1, the controversy was as to islands off the coast of Louisiana and Mississippi. The Court said at page 53:

"Moreover, it appears from the record that the various departments of the United States Government have recognized Louisiana's ownership of the disputed area; that Louisiana has always asserted it; and that Mississippi has repeatedly recognized it, and not until recently has disputed it.

"The question is one of boundary, and this court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect to the acquisition by prescription of large tracts of

country claimed by both. *Virginia v. Tennessee*, 148 U. S. 503; *Indiana v. Kentucky*, 136 U. S. 479; *Missouri v. Kentucky*, 11 Wall. 395; *Rhode Island v. Massachusetts*, 4 How. 591."

After reviewing the evidence, the Court said at page 57:

"The record contains much evidence of the exercise by Louisiana of jurisdiction over the territory in dispute, and of the general recognition of it by Mississippi as belonging to Louisiana. Apparently Louisiana had exercised complete dominion over it from 1812 with the acquiescence of Mississippi, unless the fact that the latter made a general reference to islands within six leagues of her shore in her Code of 1880 indicated otherwise. But the evidence fails to satisfy us that she attempted any physical possession or control until after 1900. The few instances referred to as showing that Mississippi asserted rights in the disputed area are of little weight and require no discussion."

In *Maryland v. Virginia*, 217 U. S. 1, (1910) the Court said at page 41:

"A perusal of the record satisfies us that for many years occupation and conveyance of the lands on the Virginia side has been with reference to the Deakins line as the boundary line. The people have generally accepted it and have adopted it, and the facts in this connection cannot be ignored."

In *Michigan v. Wisconsin*, 270 U. S. 295 (1926) the Court divided its discussion into three distinct sections, each applying to a different area of land. With respect to the first section the Court found that Michigan had previously expressly assented to Wisconsin's

claims and held that Michigan could not now be heard to insist upon a change in the boundary as recognized in her own constitution, saying at page 308:

"Notwithstanding, the State of Michigan at this late day insists that the boundary now be established by a decree of this court in accordance with the description contained in her Constitution of 1908. Plainly, this cannot be done. That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well, Direct United States Cable Co. v. Anglo American Telegraph Co., (1877) L. R. 2 A. C. 394, 421; Wheaton, International Law, 5th Eng. Ed. 268-269; 1 Moore, International Law Digest, 294 *et seq.* and *a fortiori*, to the quasi-sovereign states of the Union. The rule, long settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority. Indiana v. Kentucky, 136 U. S. 479, 509, *et seq.*; Virginia v. Tennessee, 148 U. S. 503, 522-524; Louisiana v. Mississippi, 202 U. S. 1, 53; Maryland v. West Virginia, 217 U. S. 1, 40-44; Rhode Island v. Massachusetts, 4 How. 591, 639; Missouri v. Iowa, 7 How. 660, 677; New Mexico v. Colorado, 267 U. S. 30, 40-41. That rule is applicable here and is decisive of the question in respect to the Montreal River section of the boundary in favor of Wisconsin.

As to the lands in the second section the evidence as to Michigan's prior assent to Wisconsin's claims was less emphatic, but even as to these lands the Court found that Michigan had acquiesced in Wisconsin's exercise of dominion and jurisdiction, saying at page 313:

"Some of these islands, comparatively small in area and of little consequence, have never been surveyed or any definite acts of dominion exercised over them by either state. But to this we attach no importance. The assertion and exercise of dominion by Wisconsin over the islands on the Michigan side of the channel was begun and has continued in virtue of, and in reliance upon, the readjustment of the boundary set forth in the Wisconsin Enabling Act. The rule is well-settled in respect of individual claimants that actual possession of a part of a tract by one who claims the larger tract, under color of title describing it, extends his possession to the entire tract in the absence of actual adverse possession of some part of it by another. *Clarke's Lessee v. Courtney*, 5 Pet. 319, 354; *Hunnicutt v. Peyton*, 102 U. S. 333, 368; *Ellicott v. Pearl*, 10 Pet. 412, 442; *Smith v. Gale*, 144 U. S. 509, 525-526; *Montoya v. Gonzales*, 232 U. S. 375, 377; *Houston Oil Co. of Texas v. Goodrich*, 213 Fed. 136, 142. Upon like grounds and with equal reason, under circumstances such as are here disclosed, the principle of the rule applies where states are the rival claimants. It results that the Wisconsin Enabling Act, together with the Act of Admission, gave color of title in that state to all of the islands within the limits there described; and that her original and continued possession, assertion and exercise of dominion and jurisdiction over a part of these islands, pursuant to such legislation and with the acquiescence of Michigan, extended Wisconsin's possession, dominion and jurisdiction to all of them, in the absence of actual possession of, or exercise of dominion over, any territory within the boundary by Michigan."

A similar conclusion was reached as to the lands in the third section, the Court at page 318 quoting from the language of *Indiana v. Kentucky*, 136 U. S. 479, at

page 509 and holding it "singularly apposite and conclusive." with respect to the controversy as a whole.

Compare *New Mexico v. Colorado*, 267 U. S. 30 (1924) *Louisiana v. Mississippi*, 282 U. S. 458 (1930); *Missouri v. Iowa*, 7 How. 660, 677 (1848).

See also *Vermont v. New Hampshire*, 289 U. S. 593, 597, 613 (1932), where the Court said:

"The conclusion we have reached as to the correct construction of the Order-in-Council of 1764 and the resolution of Congress under which Vermont was admitted to statehood finds support in the practical construction given by both states to the boundary, thus defined, in the long continued failure of New Hampshire to assert any dominion over the west bank of the river, and in her long acquiescence in the dominion asserted there by Vermont."

Arkansas relies upon *New Jersey v. Delaware*, 291 U. S. 361 (1934), where the Court found that acts of dominion by New Jersey, such as the service of process, assessment for taxation, making of deeds, could not serve to alter boundaries, as they had not been acquiesced in by Delaware. The Court said in that case at page 376, after referring to acts of dominion by riparian proprietors:

"The truth indeed is that almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them. There is no room in such circumstances for the application of the principle that long acquiescence may establish a boundary otherwise uncertain. *Vermont v. New Hampshire*, 289 U. S. 593, 613; *Indiana v. Kentucky*, 136 U. S. 479, 509, 511; *Massachusetts v. New York*, *supra*, p. 95. Acquiescence is not compatible with a century of conflict. Only a few instances will be mentioned among many that are available."

The Court then reviewed the circumstances showing assertions of Delaware's claim, concluding its review with the statement at page 377:

"If a record such as this makes out a title by acquiescence, one is somewhat at a loss to know how protest would be shown".

Arkansas has, however, not brought itself within the observations of the Court in the case cited, because the record in this case is barren of anything to show that Arkansas ever asserted any claim to Cutoff Island prior to the filing of the present suit.

(8) In their reply brief filed before me counsel for Arkansas said:

"The issues in the present case are without a doubt narrowed down to a question of whether or not the doctrine of the law of Thalweg shall prevail as against the doctrine of the law of Acquiescence. This is unquestionably the controlling issue, and a decision upon this issue will dispose of the entire case."

Counsel thus suggest that the rule of prescription must give way to the rule of the Thalweg; or, in other words, that prescription can never apply in a case where the boundary would otherwise be along the main channel of a river. I do not find any decisions of this Court supporting such a view. I have previously noted that the decisions in *Arkansas v. Tennessee*, 246 U. S. 158 (1917) and *Arkansas v. Mississippi*, 250 U. S. 39, (1919) show that the doctrine of the Thalweg gives way to the rule that an avulsion does not change a pre-existing boundary, so that after an avulsion a state may no longer be bounded by the middle of the main channel of the river. There would seem no reason why the doctrine of the

Thalweg should not give way to the doctrine of prescription.¹

Counsel for Arkansas rely upon the language of the Court in *Arkansas v. Tennessee*, 246 U. S. 158, where the Court (after holding that under the rule of the Thalweg, as laid down in *Iowa v. Illinois*, 147 U. S. 1 (1893), the boundary line between Arkansas and Tennessee was the middle of the main channel of the river and not a line equidistant from the well defined banks of the river) referred to an argument based upon decisions of the Supreme Courts of Arkansas and Tennessee and statutes of Tennessee and said (at page 172) :

"The combined effect of these decisions and of the legislation referred to, all of which were subsequent to the year 1876, falls far short of that long acquiescence in the practical location of a common boundary, and possession in accordance therewith, which in some of the cases has been treated as an aid of setting the question at rest. *Rhode Island v. Massachusetts*, 4 How. 591, 638, 639; *Indiana v. Kentucky*, 136 U. S. 479, 510, 514, 518; *Virginia v. Tennessee*, 148 U. S. 503, 522; *Louisiana v. Mississippi*, 202 U. S. 1, 53; *Maryland v. West Virginia*, 217 U. S. 1, 41."

Counsel also rely upon the language of the Court in *Arkansas v. Mississippi*, 250 U. S. 39, 45, where the Court again affirmed the rule of the Thalweg and said at page 45:

"We are unable to find occasion to depart from this rule because of long acquiescence in enactments and decisions and the practices of the inhabitants of the disputed territory in recogni-

¹While the point is not logically important, it may be observed that the application of the doctrine of prescription in this case at this time will actually accomplish the purpose of the doctrine of the Thalweg—"to safeguard to each state equality of access to, and right of navigation in, boundary streams". *cf. Iowa v. Illinois*, 147 U. S. 1.

tion of a boundary, which have been given weight in a number of our cases where the true boundary line was difficult to ascertain (See *Arkansas v. Tennessee, supra*, and the cases cited at p. 172)."

The language quoted does not, in my judgment indicate that it was the Court's view that the doctrine of prescription would never apply in a case where the boundary would otherwise be determined by the law of the Thalweg. I construe the language as indicating only that the proof relied upon in support of the defense of prescription was not considered by the Court sufficient to maintain that defense. I have examined the briefs and the records in the cases cited and this examination confirms my interpretation of the decisions. The proof relied upon in these cases consisted solely of certain decisions of the Supreme Court of Arkansas and Acts of its Legislature alleged to constitute recognition by Arkansas of the boundary line contended for by Tennessee (a line equidistant between banks). There appears to have been no evidence at all of adverse possession or of acts of dominion and jurisdiction by Tennessee, such as are shown in the present case. Indeed, it does not appear from an examination of the records and briefs in the cited cases that the lands in controversy there were occupied or cultivated or that there were any inhabitants of them.¹

¹In the brief for Mississippi in *Arkansas v. Mississippi*, 250 U. S. 39, at p. 60, it is said that there were no inhabitants of the territory in controversy by reason of its character. In that case it appears from the brief for Arkansas, page 29, and the record, pp. 339, 340, 345, that taxes on the lands were paid only in Arkansas and the lands were not assessed in Mississippi; the record at p. 369 shows a probate sale of the lands in Arkansas. Thus such evidence as there was of the exercise of dominion and jurisdiction seems to have been in favor of Arkansas, which prevailed in the case.

In *Arkansas v. Tennessee*, 246 U. S. 39, the brief for Tennessee on the motion to settle principles, pp. 49-73, and the brief for Tennessee on the merits, pp. 16-25, show that Tennessee's contentions rested solely upon the claim that both Arkansas and Tennessee had by statute and judicial decision recognized the boundary line between them as a line equidistant between banks. See also the brief for Arkansas on the motion to settle principles, pp. 57 ff., and the stipulation of facts on which the case was submitted, record p. 39.

My understanding of the decisions in *Arkansas v. Mississippi* and *Arkansas v. Tennessee* seems also to be supported by later decisions of the Court. It appears from *Wisconsin v. Michigan*, 295 U. S. 455 (1934) that the rule of the Thalweg would ordinarily be applicable in fixing the boundary between Wisconsin and Michigan, but in *Michigan v. Wisconsin*, 270 U. S. 295 (1926) the Court held the boundary controlled at certain points by proof of long acquiescence by Michigan in Wisconsin's possession and exercise of sovereignty and dominion. Thus the two decisions taken together indicate that the rule of prescription applies where the proof is sufficient to maintain it just as much in a case where the rule of the Thalweg would otherwise fix the boundary line as in any other case.

In *Vermont v. New Hampshire*, 289 U. S. 593 (1933) it appears from pages 596 and 597 of the opinion that the Master found that Vermont's eastern boundary when she was admitted into the Union was the thread of the Connecticut River, but that her claim of a boundary at this point would be defeated by her acquiescence in New Hampshire's exercise of dominion over the waters of the river. Vermont took no exception to this finding.

In *New Jersey v. Delaware*, 291 U. S. 361 (1934), where the Court applied the rule of the Thalweg, it appears to have rejected the contention that Delaware was bound by New Jersey's acts of dominion only because it thought the proof insufficient to show acquiescence by Delaware. If the Court had been of the opinion that the rule of acquiescence could never apply in a case where the boundary would ordinarily be fixed by the rule of the Thalweg, it would have been unnecessary for the Court to make reference in the passage

which I have quoted from the opinion¹ to the facts in the record showing the prolonged dispute and conflict between Delaware and New Jersey and thus negativating the existence of acquiescence.

(9) It is true that in most of the cases which have applied the doctrine of prescription, the Court indicated that even independently of the application of that rule, it would or might have reached the same result. The language of the opinions and of the commentators on international law indicates, however, that a title based solely on prescription would be upheld even where there was no other basis for the claims of the State relying upon prescription. While in *Indiana v. Kentucky*, 136 U. S. 479, the Court referred to Indiana's acquiescence in Kentucky's dominion and jurisdiction as a recognition of the right of Kentucky "too plain to be overcome except by the plainest and most unquestioned proof", yet in the immediately following sentence the court laid down the rule without limitation:

"It is a principle of public law, universally recognized that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it is conclusive of a nation's title and rightful authority."

And in *Indiana v. Kentucky*, 136 U. S. 479 at page 511, the Court quoted as follows from Vattel's Law of Nations, and Wheaton on International Law:

"Vattel, in his Law of Nations, speaking on the same subject, says: 'The tranquility of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire and other rights of nations, should remain uncertain, subject to dispute and ever ready to

¹See quotation at page 65, *supra*.

occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title'. Book II, c. 11, §149. And Wheaton, in his International Law, says: 'The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to an article of property in question'. Part II, c. IV §164."

In Hall on International Law (1924), Sections 31 and 36, the author says:

"A state may acquire property by prescription from the operation of time. Title by prescription arises out of long continued possession where no original source of proprietary right can be shown to exist or where the possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right or has been unable to do so. * * * The admission of a proprietary right grounded upon the mere afflux of time is intended to give security to property and to diminish litigation."

In Hyde on International Law (1922), at Section 116, it is said:

"By operation of the principle known as that of prescription, the uninterrupted exercise of dominion over territory for a sufficient length of

time by one State is deemed to destroy the value of adverse claims of sovereignty preferred by any other, and thus to clothe the occupant with such rights of property and control as may once have been vested in such a claimant. These rights do not seem to come into being or derive their origin from prescription. That term betokens rather the means by which they are transferred from a State not in fact exercising them to another which is in actual possession. It thus implies that when the existing occupant first entered into that possession, the territory was already subjected to a dominion which had been productive of rights of property and control, and was not, therefore, at that time *res nullius*, or available for acquisition by means of occupation.

"Respect for the principle of prescription prevents a State which may have long slept upon its rights, from retaining a solid claim to exercise them at the expense of a foreign occupant whose possession satisfies certain requirements which practice has demanded. The strength of the equities of the latter lies in the implied acquiescence in the condition of affairs which its own conduct in relation to the land concerned has produced.

"It is doubtless possible for a State to dispute actively the validity of its neighbor's claims of sovereignty over territory long in its possession and over which it was the first to establish a right of property and control by virtue of occupation never subsequently given up. Notwithstanding the ease or difficulty with which the occupant may be able to prove its case without recourse to the doctrine of prescription, the right to invoke and apply it may prove to be valuable as a means of barring a colorless adverse claim, and in discouraging its preferment.

"Recognition of the principle of prescription has been due to the importance attached to the maintenance of a stable condition of affairs among

States. It has been deemed more desirable to the family of nations that an occupant long in possession should be suffered to remain in unmolested control, than that an adverse claimant, although unjustly deprived of possession, should retain its rights of sovereignty, unless it made constant and appropriate effort to keep them alive, and that by ceaseless protests against the acts of the wrong-doer."

See also Oppenheim, International Law, 5th Edition (1937), pp. 545, ff.; *Direct United States Cable Co. v. Anglo-American Cable Co.*, L. A. 2 A. C. 394, 420 (1877).

All of these authorities indicate that possession alone, even without color of title, and even where the true boundaries would not otherwise be uncertain, will support the plea of prescription; see also *Vermont v. New Hampshire*, 289 U. S. 593; *Michigan v. Wisconsin*, 270 U. S. 295; *Wisconsin v. Michigan*, 295 U. S. 455, all referred to *supra*. But in the present case it must be observed that Tennessee's possession is not that of one exercising dominion over the land without any basis whatsoever. The lands in controversy have for upwards of a hundred years been a part of the eastern shore of the river, immediately contiguous to, and connected with, Tennessee territory, and to the eye of the general observer indistinguishable therefrom.¹ It is easy to understand that when in 1821 the avulsion severed the land in controversy from the west bank of the river, the local authorities of Tennessee and the residents

¹It is true that for some distance east of the concrete road shown on Tennessee Exhibit 14, the old banks of the Mississippi River are discernible and the Obion River (which is shown both on Tennessee Exhibit 14 and on the quadrangle map which was introduced in evidence by both parties and is attached to this report) is now using for its channel so much of the old bed of the Mississippi River as is necessary to accommodate the flow of the Obion. But the entire body of land in controversy is now, and long has been, separated by the broad channel of the Mississippi River from what is ordinarily thought of as Arkansas.

of the neighborhood failed to appreciate that under legal principles the territory thus severed remained still subject to the jurisdiction of the sovereign of the territory to which it had previously been attached. It was not until 1892 that this Court had occasion in *Nebraska v. Iowa*, 143 U. S. 359, to authoritatively declare and apply the doctrine of avulsion as applying between states. Moreover, it must be conceded that room for doubt existed as to the proper construction of the Act of June 15, 1836, admitting Arkansas into the Union and the possible effect thereof as placing the lands in controversy outside the eastern boundary of Arkansas and within Tennessee.

(10) Arkansas contends that no weight should be given to the fact that Tennessee assessed the lands in controversy for taxes and sold them for non-payment of such taxes, because if within the boundaries of Arkansas, they were public lands of the United States, not subject to taxation. *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 1886; *Wisconsin Central R. R. Co. v. Price County*, 133 U. S. 496, 504 (1889); *Lee v. Osceola, etc. District*, 268 U. S. 643 (1925); *Irwin v. Wright*, 258 U. S. 219 (1921). But the **validity** of the Tennessee assessments and tax sales is not involved in this case. The fact that Tennessee assessed the lands for taxes and sold a part of them for non-payment of taxes is important only as evidence of the exercise of dominion and jurisdiction over the lands by Tennessee, which few other circumstances could more vividly demonstrate. The fact that the tax assessments and sales were invalid does not impair their quality as assertions of jurisdiction. The occupancy of land by a trespasser without legal basis is **wrongful**, but it is the most convincing and essential evidence of adverse possession.

These observations apply also to the argument that Tennessee's grants of patents covering the lands in controversy and its authorization of entries and surveys must be disregarded because these acts were all without legal authority if the lands did not fall within Tennessee. If the lands were within Tennessee so as to make valid *ab initio* the granting of patents and the authorization of surveys and entries, then it would be unnecessary to consider the defense of prescription. It is precisely because these acts are found to have been unauthorized by virtue of the lands being outside of Tennessee that Tennessee's performance of them supports its defense of prescription. The acts are relied upon only to show Tennessee's exercise of dominion and jurisdiction.

Even, however, if the tax assessments and tax sales and the grants of patents were ignored, the other proof in the record would, in my opinion, be sufficient to prove that Tennessee was continuously asserting dominion and jurisdiction over the lands in controversy. I refer to the evidence showing that Tennessee assessed poll taxes upon the inhabitants of the island, required them to do road work, caused its officers to marry them, to serve them with process and to prosecute them, provided a school for their education and permitted them to vote in its elections.

(11) It is suggested in the brief for Arkansas that Tennessee cannot prevail upon the doctrine of prescription because the lands in controversy are unsurveyed lands of the United States, in whom legal title is vested. The doctrine of prescription in a boundary action is, however, applied, not for the purpose of establishing title to the lands in controversy, but in order to establish polit-

ical jurisdiction over them.¹ When Tennessee urges the defense of adverse possession in this case, it is urging it not against the United States, but against Arkansas. It is therefore unnecessary to consider whether Tennessee would have a right to urge its exercise of dominion and jurisdiction even against the United States in a case involving political jurisdiction or boundaries, arising between the United States and the State. I find, accordingly, no basis for the suggested application in this case of the rule referred to in the brief for Arkansas that "adverse possession will not lie against a person in respect to property (to) which that person cannot give a good title or has no title", because this suit involves not title, but boundaries, and Arkansas was at all times capable of asserting the same dominion and jurisdiction over the lands in controversy as was Tennessee.

Blue Grass Towhead is a formation adjoining Moss Island (the cutoff island) on the west thereof, which has been formed since the year 1916 by the gradual processes of the river and is now attached physically to the eastern shore of the river. Insofar as this formation is in controversy in the present litigation, I am of the opinion that it also is subject to the jurisdiction of Tennessee, as it was formed by gradual processes and is attached to Moss Island; see *Arkansas vs. Tennessee*, 246 U. S. 158, 173.

¹Thus it is conceded that Arkansas is entitled to maintain this boundary action for the purpose of obtaining a decree that the lands fall within its boundaries, even though legal title to the lands is not in Arkansas, but in the United States or others.

See *New Jersey v. Delaware*, 291 U. S. 361, 372 (1933).

"The truth, indeed, is that for the purpose of an inquiry into the boundaries between colonies or states, questions of private ownership are of secondary importance."

SUMMARY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

While the foregoing statement indicates with perhaps unnecessary fullness my findings of fact and conclusions of law, I make the following summary:

(1) The Territory of Arkansas was organized by act of March 2, 1819, 3 Stat. 493, being carved out of the Territory of Missouri, which was a part of the Louisiana Purchase, and the eastern boundary of the Territory was the middle of the main channel of the Mississippi River.

(2) In 1819 the lands in controversy were on the west side of the main channel of the river and were part of the Territory of Arkansas.

(3) The avulsion at Needham's Cutoff occurred in 1821.

(4) The main channel of the river flowed through the cutoff prior to 1836.

(5) Arkansas was admitted into the Union on June 15, 1836, 5 Stat. 50, and its eastern boundary was fixed at the middle of the main channel of the Mississippi River.

(6) On June 15, 1836 when Arkansas was admitted into the Union, the lands in controversy were on the east side of the main channel of the Mississippi River.

(7) The avulsion did not change the boundary line theretofore existing between Tennessee and the Territory of Arkansas.

(8) The Act of Congress of June 15th, 1836, admitting Arkansas into the Union did not have the effect of excluding from the boundaries of the State of Arkansas

lands which immediately prior to the adoption of the Act were within the Territory of Arkansas.

(9) Tennessee was admitted into the Union on June 1, 1796, 1 Stat. 491, c. 47. Its western boundary was the middle of the main channel of the Mississippi River. The lands in controversy were in 1796 on the west of the main channel of the river.

(10) The Act of June 15th, 1836, 5 Stat. 50, admitting Arkansas into the Union, did not have the effect of enlarging the boundaries of Tennessee.

(11) From 1826 to the date of the filing of this suit, Tennessee has continuously exercised dominion and jurisdiction over the lands in controversy.

(12) Arkansas has acquiesced in Tennessee's exercise of dominion and jurisdiction.

(13) The lands described in Count One of the complaint are now within the boundaries of Tennessee as a result of prescription. Bluegrass Towhead, which has been formed by gradual processes and is attached to Moss Island, is likewise now within the boundaries of Tennessee.

(14) The boundary between Arkansas and Tennessee as to the lands described in Count Two of the complaint should be established in accordance with the stipulation entered into by the parties and filed with this report.

(15) The matter involved in this case being governmental in character, in which each state has a real and yet not a litigious interest, within the rule adopted in *Nebraska v. Iowa*, 143 U. S. 359, 370 (1892), and *Maryland v. West Virginia*, 217 U. S. 577, 582

1910) and recognized in *North Dakota v. Minnesota*, 53 U. S. 583 (1924), the costs should be equally divided.

RECOMMENDATIONS FOR DECREE

I recommend that a decree be entered providing as follows:

(1) That the claims of Arkansas to the lands described in Count One be rejected and the claims of Tennessee thereto be maintained, and that the boundary line between the States at the point referred to in Count One be fixed at the middle of the main channel of navigation on the Mississippi River as it existed at the date of the filing of the bill of complaint herein.

(2) That the boundary between Arkansas and Tennessee at the point described in Count Two of the complaint be fixed in accordance with the stipulation entered into by the parties and filed herewith, and that a Commissioner be appointed to mark the boundary line as set out in the stipulation by placing three suitable markers along the line and a fourth one on sufficiently high ground to be used in locating the other three in the event they should be covered by water, moved or destroyed.

(3) That costs be equally divided:

Respectfully submitted,

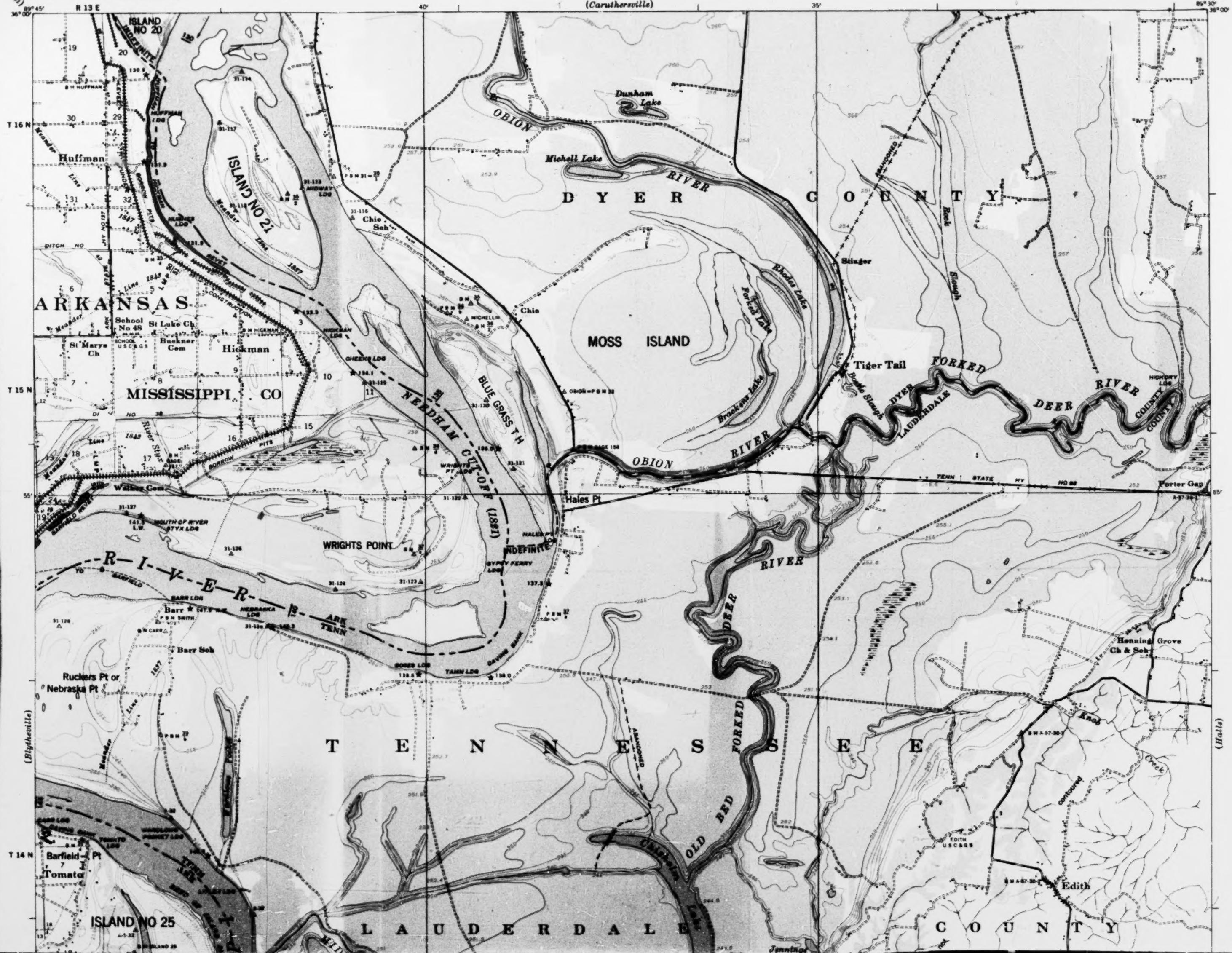
MONTE M. LEMANN,
Special Master.

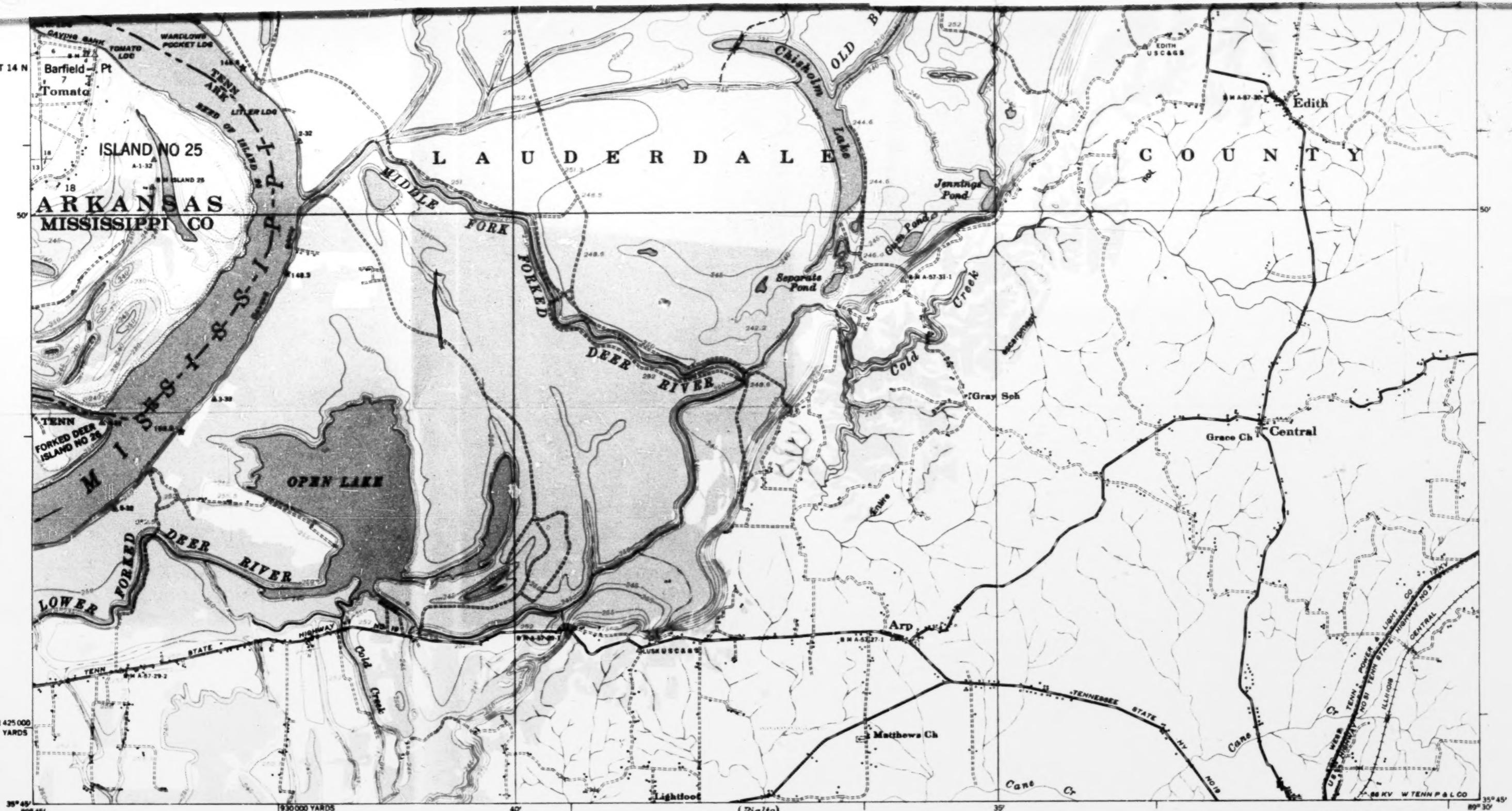
WAR DEPARTMENT
CORPS OF ENGINEERS

2622:4750/99:

ARKANSAS-TENNESSEE
HALES POINT QUADRANGLE
GRID ZONE "C"

(Dyersburg)





Prepared under the direction of the President, Mississippi River Commission.
 Horizontal control by Mississippi River Commission and Corps of Engineers,
 U. S. Army, Memphis District.
 Vertical control by Mississippi River Commission and Corps of Engineers,
 U. S. Army, Memphis District.
 Topography by Corps of Engineers, U. S. Army, Memphis District, 1930.
 Revised by Mississippi River Commission, 1932-35.
 Political boundaries are shown according to best available information
 and are subject to change except where established by court decision.
 Work under Flood Control Act as of March, 1934.
 Polyconic Projection, North American Datum.

Datum is mean gulf level at Biloxi, Mississippi. Elevations differ from mean sea level elevations as determined by the U. S. Coast and Geodetic Survey, by small fractions of a foot. Persons interested may secure elevations of bench marks as determined by the latest U. S. C. & G. S. adjustment, by applying to the U. S. Coast and Geodetic Survey.

FIVE THOUSAND YARD GRID COMPUTED FROM GRID SYSTEM FOR PROGRESSIVE MAPS
 IN THE U. S. ZONE C, U. S. C. & G. S. SPECIAL PUBLICATION NO. 90

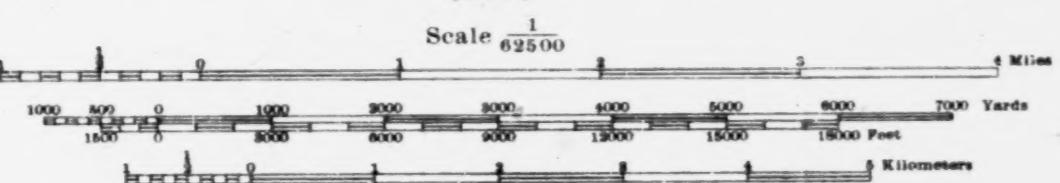
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APPROXIMATE MEAN
 DECLINATION 1930
 NO ANNUAL MAGNETIC CHANGE

Distances below Cairo gage are shown at 5 mile intervals.
 Distances above mouths of Obion and Forked Deer Rivers
 are shown at 5 mile intervals.

HARD IMPERVIOUSLY SURFACED ROADS
 OTHER MAIN TRAVELED ROADS, GRAVEL

HALES POINT, ARK.-TENN.
 EDITION OF 1935



Levee		Levee mile post	LMP
Retards and dikes		Levee station	LS
Revetment		Towhead	TH
River Gage	•		